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REPUBLIC OF KENYA

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**THE NATIONAL ASSEMBLY**

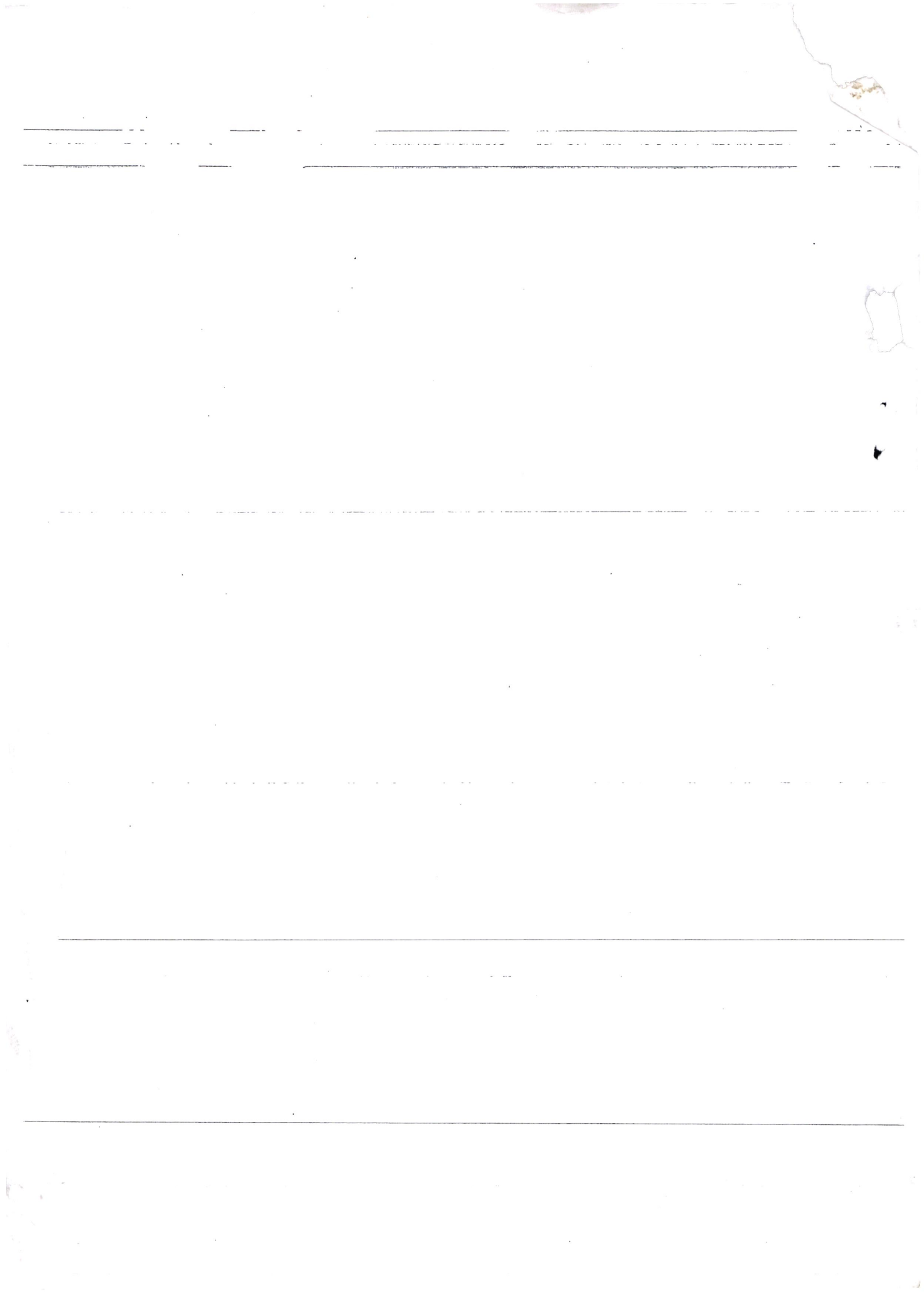
**11<sup>TH</sup> PARLIAMENT – FOURTH SESSION - 2016**

**PUBLIC ACCOUNTS COMMITTEE**

**REPORT OF THE PUBLIC ACCOUNTS  
COMMITTEE ON THE SPECIAL AUDIT REPORT  
OF JUNE 2014; OVER THE PROCUREMENT OF  
ELECTRONIC VOTING DEVICES FOR THE 2013  
GENERAL ELECTION BY THE INDEPENDENT  
ELECTORAL AND BOUNDARIES COMMISSION  
(IEBC)**

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MARCH, 2016



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## ABBREVIATIONS

BVR	Biometric Voter Registration
CEO	Chief Executive Officer
CCC	Canadian Commercial Corporation
CS	Cabinet Secretary
EDC	Export Development Corporation
ERP	Enterprise Resource Planning
ERTS	Electronic Result Transmission System
ESI	Electrical Services International Ltd
EVID	Electronic Voter Identification Device
GoK	Government of Kenya
ICT	Information Communication Technology
IEBC	Independent Electoral and Boundaries Commission
IFES	International Foundation for Electronic Systems
IFMIS	Integrated Financial Management Information System
IIEC	Interim Independent Electoral Commission
KEBS	Kenya Bureau of Standards
OMR	Optical Mark Reader
PAC	Public Accounts Committee
PPOA	Public Procurement Oversight Authority
PS	Principal Secretary
UIDA	Unique Identification Authority of India
UNDP	United Nations Development Program
UPK	Universal Polling Kits

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## **PREFACE**

**Mr. Speaker, Sir,**

The Public Accounts Committee derives its mandate from Standing Order 205(2) of the National Assembly, which provides that:-

**“The Public Accounts Committee (PAC) shall be responsible for the examination of the accounts showing the appropriations of the sum voted by the House to meet the public expenditure and of such other accounts laid before the House as the Committee may deem fit”.**

The primary mandate of PAC is therefore to oversight the expenditure of public funds by Ministries/Departments, Constitutional commissions and independent offices to ensure value for money, optimal application of public funds and adherence to Government financial regulations and procedures.

The Committee executes its mandate on the basis of annual and special audit reports prepared by the Office of the Auditor General.

## **GUIDING PRINCIPLES**

In the execution of its mandate afore-stated, PAC is guided by core Constitutional and statutory principles on electoral system and process, and public finance management, as well as established parliamentary customs, traditions, practices and usages. These principles include the following:

### **Constitutional Principles on Electoral System and Process**

Article 81 of the Constitution states that electoral system and process shall comply with the following principles;

- (a) freedom of citizens to exercise their political rights under Article 38;
- (b) not more than two-thirds of the members of elective public bodies shall be of the same gender;
- (c) fair representation of persons with disabilities;
- (d) universal suffrage based on the aspiration for fair representation and equality of vote; and
- (e) free and fair elections, which are—
  - (i) by secret ballot;
  - (ii) free from violence, intimidation, improper influence or corruption;
  - (iii) conducted by an independent body;
  - (iv) transparent; and
  - (v) administered in an impartial, neutral, efficient, accurate
  - (vi) and accountable manner.

## **Constitutional Principles on Public Finance**

Article 201 enacts fundamental principles that “...shall guide all aspects of public finance in the Republic...” The principles are:-

- (a) there shall be openness and accountability, including public participation in financial matters;
- (b) the public finance system shall promote an equitable society, and in particular—
  - (i) the burden of taxation shall be shared fairly;
  - (ii) revenue raised nationally shall be shared equitably among national and county Governments; and
  - (iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalized groups and areas;
- (c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;
- (d) public money shall be used in a prudent and responsible way; and;
- (e) financial management shall be responsible, and fiscal reporting shall be clear.

**Mr. Speaker,**

PAC places a premium on these principles, among others, and has been guided by them in the entire process that has culminated in this Report.

### **Direct Personal Liability**

Article 226(5) of the Constitution provides that:-

**“If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not”.**

PAC considers this Constitutional provision as the basis for holding each individual Accounting Officer and other Public Officers directly and personally liable for any loss of public funds under their watch.

The Committee has and will continue to invoke this provision in its recommendations to hold those responsible personally accountable. This is also intended to serve as a deterrent measure.

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## **Obligations of Accounting Officers**

Section 68 (1) of the Public Finance Management Act, 2012 provides, inter alia, that:-

**“An accounting officer for a national Government entity, Parliamentary Service Commission and the Judiciary shall be accountable to the National Assembly for ensuring that the resources of the respective entity for which he or she is the accounting officer are used in a way that is lawful and authorized, and effective, efficient, economical and transparent.”**

This provision obligates all accounting officers to appear before the Public Accounts Committee of the National Assembly to respond to audit queries in their respective ministries/departments.

And section 74 (2) of the same PFM Act stipulates that:-

***“If a Cabinet Secretary reasonably believes that an accounting officer is engaging in or has engaged in improper conduct within the meaning of subsection (4), the Cabinet Secretary shall:-***

***Take such measures as may be provided in regulations; or***

***Refer the matter to the relevant office or body in terms of the statutory and other conditions of appointment or employment applicable to that accounting officer.”***

**Mr. Speaker, Sir,**

This section empowers the appointing authority to discipline errant accounting officers, which could include revoking their appointment. This provision has sealed a long standing loophole that has previously seen accounting officers continuously commit or preside over fiscal indiscipline and malpractice in their ministries with impunity without sanctions.

PAC strongly holds the view that these provisions of the law were intended to be fully applied to give effect to the high principles in Article 201 of the Constitution stated hereinabove, to ensure prudent and responsible use of public funds.

The Committee has, accordingly, applied these provisions to recommend diverse disciplinary actions, investigations and surcharging of various persons found to bear responsibility for breaches of the law and/or responsible for the loss or wastage of public funds.

## Committee Membership

The Committee was re-constituted during the Third Session of the 11<sup>th</sup> Parliament in April 2015, and comprises the following Honourable Members:-

1. Hon. (Eng.) Nicolas Gumbo, MP - Chairman
2. Hon. Jackson K. Rop, MP - Vice- Chairman
3. Hon. Joseph Manje, MP
4. Hon. Gonzi Rai, MP
5. Hon. Julius Melly, MP
6. Hon. Kangogo Bowen, MP
7. Hon. Timothy Bosire, MP
8. Hon. Fathia Mahbub, MP
9. Hon. Mwadime Andrew, MP
10. Hon. Sakwa Bunyasi, MP
11. Hon. Arthur Odera, MP
12. Hon. Abdikadir Aden, MP
13. Hon. Kanini Kega, MP
14. Hon. John Mbadi, MP
15. Hon. Kyengo Katatha Maweu, MP
16. Hon. Charles Geni Mong'are, MP
17. Hon. (Dr.) David Eseli Simiyu, MP
18. Hon. Jessica Mbalu, MP
19. Hon. Alice Nyanchoka Chae, MP
20. Hon. Joel Onyancha, MP
21. Hon. Kareke Mbiuki, MP
22. Hon. Manson Nyamweya, MP

- 
23. Hon. Mathias Robi, MP
  24. Hon. Stephen Manoti, MP
  25. Hon. Junet Sheikh Nuh, MP
  26. Hon. Silvance Onyango Osele, MP
  27. Hon. Jude Njomo, MP

**Appreciation**

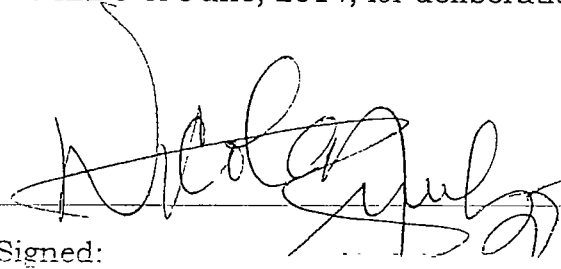
In conclusion, Honourable Speaker, the Committee registers its unreserved thanks to the Office of the Speaker and the Clerk of the National Assembly, the Auditor General and the entire Office of the Auditor General (OAG), Treasury and the witnesses who appeared and made quality submissions before the Committee. Special appreciation also goes to the Clerks to the Committee who have had to go beyond the normal call of duty on numerous occasions.

The commitment and devotion to duty of all those involved in this noble task made the work of the Committee and production of this report a success. We thank each one of them.

**Mr. Speaker, Sir,**

On behalf of the Members of the Committee, and pursuant to Standing Order no. 199(6), it is my pleasant duty to table the Report of the Public Accounts Committee on its consideration of the Special Audit Report on the Procurement of Electronic Voting Devices for the 2013 General Election by the IEBC of June, 2014, for deliberation and adoption by the House.

Signed:

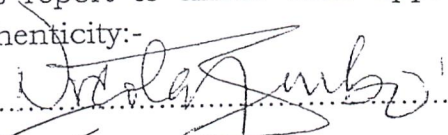

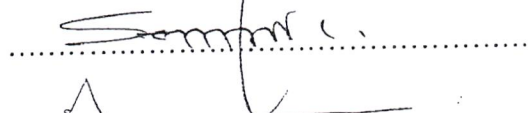
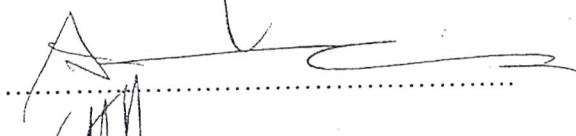
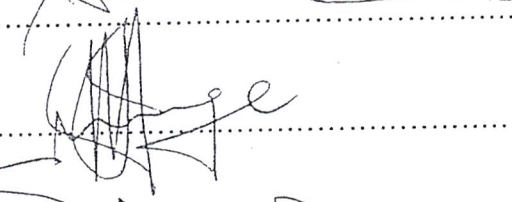
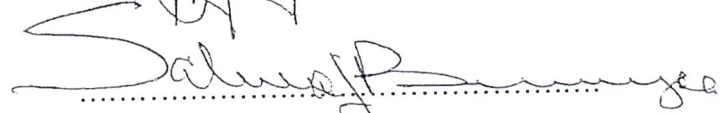
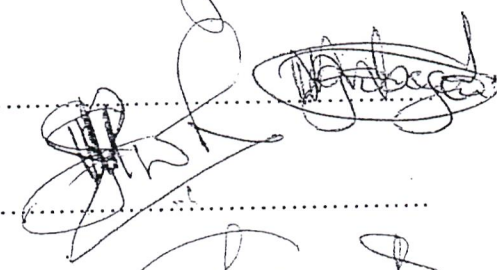
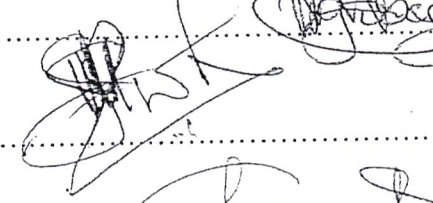
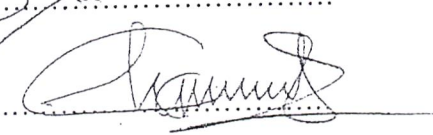
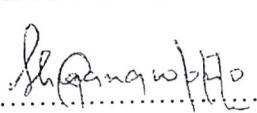
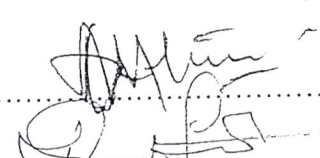
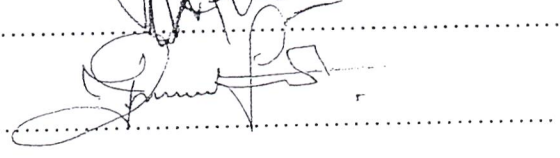
  
**Hon. (Eng.) Nicolas Gumbo, MP**  
**Chairman, Public Accounts Committee**

Date:  .....

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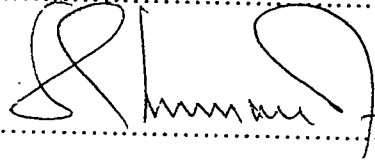
**ADOPTION OF THE PUBLIC ACCOUNTS COMMITTEE REPORT  
ON THE PROCUREMENT OF ELECTRONIC VOTING DEVICES  
FOR THE 2013 GENERAL ELECTION BY THE IEBC**

The Honourable Members of the Public Accounts Committee (PAC), do hereby affix their signatures to this report to affirm their approval and confirm its accuracy, validity and authenticity:-

1. Hon. (Eng.) Nicolas Gumbo, MP ..... 
2. Hon. Jackson K. Rop, MP ..... 
3. Hon. Gonzi Rai, MGH, MP ..... 
4. Hon. Joel Onyantha, MGH, MP ..... 
5. Hon. Kanini Kega, MP ..... 
6. Hon. Sakwa Bunyasi, MP ..... 
7. Hon. John Mbadi, MP ..... 
8. Hon. Kyengo Katatha Maweu, MP..... 
9. Hon. Charles Geni Mong'are, MP..... 
10. Hon. Manson Nyamweya, MP .....
11. Hon. Alice Nyanchoka Chae, MP..... 
12. Hon. Mwadime Andrew, MP..... 
13. Hon. Timothy Bosire, MP ..... 
14. Hon. Abdikadir Aden, MP .....

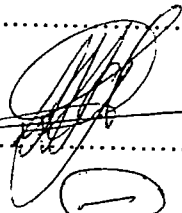
~~15. Hon. Fathia Mahbub, MP~~

16. Hon. Arthur Odera, MP



17. Hon. Stephen Manoti, MP

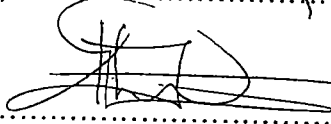
18. Hon. Silvance O. Osele, MP



19. Hon. Jude Njomo, MP

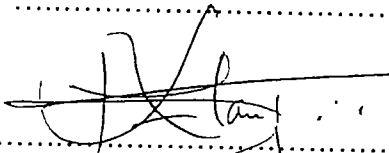


20. Hon. Dr. David Eseli Simiyu, MP

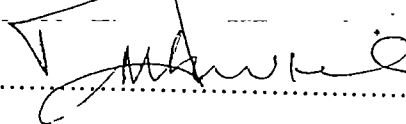


21. Hon. Julius Melly, MP

22. Hon. Jessica Mbalu, MP



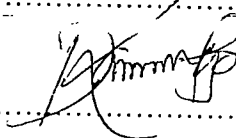
23. Hon. Joseph Manje, MP



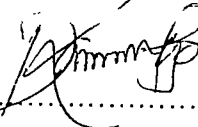
24. Hon. Kareke Mbiuki, MP

25. Hon. Mathias Robi, MP

26. Hon. Junet Sheikh Nuh, MP



27. Hon. Kangogo Bowen, MP



## PART I

### 1.0 EXECUTIVE SUMMARY

On 3<sup>rd</sup> June 2013, the Committee requested for a special audit on the procurement of Biometric Voter Registration (BVR) kits that had been procured for the March 2013 general election, by the Independent Electoral and Boundaries Commission (IEBC). This was informed by their massive failure on Election Day and suspected misappropriation of funds and mismanagement of their procurement.

The special audit and the Committee hearings exposed massive procurement irregularities aided by a lack of a procurement plan. BVR procurement for instance saw tender opening minutes not duly signed, financial and technical proposals were opened at the same time contrary to the law; and the CEO appointed members in the evaluation committee from the due diligence team that travelled to India to evaluate one of the bidders. The procurement stalled after the vested interests could not budge.

The procurement was then taken over by Government which saw advice by the Attorney General ignored. The procurement was direct, costing the country a principal loan amount of Kshs. 6,480,000,000.00, plus interest of Kshs. 1,592,829,037.41, loan insurance of Kshs. 988,250,009.00 and a brokerage fee of Kshs. 2,494,559,058.55.

On EVIDs kits, the mismanagement of procurement continued unabated. As much as technical advice was ignored by the Commission, no individual evaluation was done, there was no due diligence done on the successful bidder and the kits were deployed uninspected contrary to the law. This led to massive failure by the kits on Election Day. The contract was then varied by more than 10% in contravention of procurement laws. The current CEO then went ahead to pay Kshs. 258 million without a valid contract.

Further, on the Electronic Results Transmission, mobile phones were un-procedurally procured using quotation method, at Kshs. 17,847,049.00, WAN directly procured from Safaricom at Kshs.6,132,013.00 and another Kshs. 480,516 paid to Airtel for services not rendered.

The Committee finds several officers culpable. The Chairman of the Commission failed to provide leadership and was involved in operations of the secretariat. The Committee was also told that he was one of the opposing sides with vested interests in the Commission. He also failed to bring to the attention of the commissioners, advice by experts to cancel the EVID procurement. The Commissioners failed as a whole to provide policy and oversight at the secretariat. Indeed, some Commissioners were

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mentioned to have had vested interest as detailed in this report. They further approved variation of contract and allowed supply of laptops instead of hand held devices. Maj. (Rtd.) James Oswago, the then accounting officer was responsible for the mismanagement of the procurement of both BVR and EVIDs. He un-procedurally appointed tender, evaluation and due diligence committees. He further allowed variation of contract of EVIDs and made payment without duly confirming inspection on delivery.

Other senior officers of the Commission are culpable of abdication of duty Mr. Wilson Shollei, the then deputy CEO, had procurement as one of his major responsibilities as specified in his appointment letter. He and Mr. Bernard Nyachio, the then head of procurement, are directly culpable of failure to among others, ensure EVIDs kits were inspected on delivery.

Members of the various tender committees are individually and jointly culpable of flouting basic procurement rules as detailed in this report.

The joint technical committee formed by the Government is also culpable for failure to safeguard public interest, occasioning loss of funds by getting an expensive loan, and facilitating direct procurement, against advice of the Attorney General.

The current CEO, Mr. Ezra Chiloba is culpable for paying Face Technologies an extra Kshs. 258 Million without a valid contract.

This Committee recommends that the court case currently in progress against Maj. (Rtd.) James Oswago and others be expedited. It also recommends action on all those found culpable as detailed in the report. The Committee further recommends that Face Technologies be blacklisted from public tenders for their blatant violation of terms of contract. The Attorney General is further asked to institute recovery measures on all payments made without service rendered.

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The Committee further recommends that the Attorney General immediately works on legislation to govern 'Government to Government' procurement. The equipment held by IEBC should be independently audited and their ability to conduct the coming elections audited. These equipment, and others to be deployed, must be delivered at least twelve (12) months before General Election day and 2 test runs conducted with stakeholders.

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The Committee finally recommends that the IEBC have a maximum of three (3) commissioners, who shall serve on a part time basis.

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## PART II

### 2.0 BACKGROUND INFORMATION AND AUDITOR GENERAL'S FINDINGS

The Electoral Commission of Kenya (ECK), now defunct, was disbanded by the 10<sup>th</sup> Parliament in 2008 and replaced with the Interim Independent Electoral Commission of Kenya (IIEC).

Civil unrest in the aftermath of Kenya's 2007 presidential elections and the election anomalies reported as a result prompted the Government of Kenya to completely overhaul its system of managing elections.

The Interim Independent Electoral Commission (IIEC) was formed to replace the Electoral Commission of Kenya (ECK) and was charged with the mission to institutionalize sustainable electoral processes that would guarantee free and fair elections. The team had nine commissioners. The chairman and commissioners were nominated through a competitive process by Parliament appointed by the President in consultation with the Prime Minister and sworn in on May 11, 2009.

The body was mandated to:

- Reform the electoral process management of elections and to institutionalize free and fair elections.
- Establish an efficient and effective secretariat.
- Promote free and fair elections.
- Register voters afresh and create a new voters' register.
- Develop a modern system for collection, transmission and tallying of electoral data.
- Conduct a referendum for a new constitution.
- Facilitate the observation, monitoring evaluation of elections and referenda.
- Promote voter education and culture of democracy
- Settle minor electoral disputes during an election as may be provided by law.

The IIEC had twelve months from 24<sup>th</sup> December, 2009 to December 2010 to discharge its mandate. Alternatively, it would cease to exist three months after a new constitution was effected. In that case, the new constitution would provide for a permanent successor electoral body, which would take up the role of reforms.

The Commission successfully fulfilled its mandate — registered voters afresh and created a new register, conducted the referendum on the new

---

Constitution and by-elections in Bomachoge, Shinyalu, South Mugirango, Matuga, Makadara, Starehe, Juja and Wajir South constituencies.

The Commissioners serving in the IIEC were Mr. Ahmed Issack Hassan (Chairman), Mr. Simiyu Abuid Wasike, Ms. Winnie Guchu, Mr. Yusuf Nzibo, Mr. Hamara Ibrahim Adan, Mr. Ken Nyaundi, Ms. Tiyah Galgalo, Mr. Davis Chirchir and Mr. Douglas Mwashigadi.

Under the dispensation of the new constitution, there was the establishment of the Independent Electoral and Boundaries Commission (IEBC) whose responsibilities included;

- The continuous registration of citizens as voters.
- The regular revision of the voters roll.
- The delimitation of constituencies and wards.
- The regulation of nomination of candidates by political parties.
- The settlement of electoral disputes other than petitions.
- The registration of candidates for election.
- Voter education.
- The facilitation of the observation, monitoring and evaluation of elections.
- The regulation of the amount of money that may be spent by or on behalf of a candidate or party in any election.
- The development of a code of conduct for candidates and parties contesting elections.
- Monitoring compliance with the electoral laws.
- Supervising referenda and elections to any elective body or office established by this Constitution.
- Review the number, names and boundaries of constituencies at intervals of eight and twelve years.

The special audit was carried out pursuant to a request by the Public Accounts Committee of the National Assembly on 3<sup>rd</sup> June 2013, asking for a special audit on the procurement of Biometric Voter Registration (BVR) kits that had been procured for the March 2013 general election, by the Independent Electoral and Boundaries Commission (IEBC). This request was made on the basis that the kits had largely failed during the elections and it was therefore felt that this was a waste of tax payers' funds.

The Committee also believed that there was wanton misappropriation of funds in relation to the budget for BVR Kits and what was actually spend in the purchase of the electronic voting devices. It was also in the public knowledge that the procurement process was full of irregularities and malpractices which the Committee sought to un-earth.

The special audit was conducted between July 2013 and March 2014. Its

terms of reference were to:-

- Establish what triggered the requirement for these devices for the general election in Kenya.
- Establish the amount of money spent and the financing arrangements on each item.
- Carry out a comprehensive review of the procurement processes used in acquiring the above devices and establish if these processes were in compliance with the Government's procurement requirements and legislation.
- Establish whether the procured devices were delivered in the right specifications, quantity, timely and to the intended recipients.
- Establish if there was value for money to the public on each of the item.
- Identify irregularities and persons responsible for these irregularities.

On 8 July 2013 the scope of the work was revised to include four more devices. This was after it emerged that during the elections, IEBC had intended to use several IT related equipment and not BVR kits alone.

The revised scope included the following device that had been intended for use:-

- Biometric Voter Registration (BVR)
- Electronic Voter Identification Device (EVID)
- Electronic Result Transmission System (ERTS)
- Optical Mark Reader (OMR)
- Universal Polling Kits (UPK)

The audit established the following:-

#### BVR

- I. There was no evidence that the procurement plans for 2011/2012 and 2012/2013 were approved by the IEBC management.
- II. The tender opening minutes for the BVR tender were only signed by the Chairman and Secretary, while the Tender Opening Committee opened financial proposals and technical proposals at the same time, which was contrary to the Public Procurement and Disposal Act, 2005 and Regulations 2006.
- III. The Accounting Officer irregularly appointed persons to the evaluation and due diligence team for a trip to India.
- IV. There was no evidence that the CEO consulted the Commission or the Tender Committee before he terminated the first BVR tender.

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- V. Procurement of BVR kits was financed by a loan from Standard Chartered Bank of London through the Canadian Commercial Corporation (CCC) and Export Development Corporation (EDC). The total loan amount was for Kshs.6,480,000,000.00 and was to be used to procure 15,000 BVR kits. Exchequer releases to procure the BVRs were more than the money required by Kshs.192, 518,736.00.
- VI. In addition to the loan amount of Kshs.6,480,000,000.00, whose interest was €14,414,742.42 (Kshs.1,592,829,037.41), there were further charges including loan insurance premium to Export Development Corporation of €8,943,439 (Kshs.988,250,009.00) arrangement fee, facility agent fees, and lenders legal counsel, totalling €22,575,195.10 (Kshs.2,494,559,058.55).
- VII. There was cost variation and change in specifications during the BVR kits transactions. In the first attempt, IEBC had indicated they needed 9,750.00 BVR kits. In the second case, the kits were increased to 15,000 units. The cost varied as a result of change in specifications from €2,227.44 (Kshs.246,132.00) in part I to €3,027.29 (Kshs. 334,515.54) for BVR 2, per unit. The increase in unit cost of a complete BVR kit in part 2 was therefore €799.85 (Kshs.88,383.42) more than in BVR part 1.
- VIII. The BVR kits were supplied to IEBC by SAFRAN Morpho of France while there was no contract between the two institutions.
- IX. The law and indeed the Attorney General's advice were not fully factored in; in as far as recommending the involvement of the National Treasury in validating the direct procurement of the BVR kits.

#### EVIDs

- I. Evaluators did not conduct individual evaluation as per Regulation 16 (6) of the Procurement Regulations.
- II. IEBC failed to conduct due diligence on a successful bidder even after reports of malpractice in Uganda by the same company.
- III. Letters of notification of award to successful and unsuccessful bidders were not done on the same day as per Section 67(2) of the Procurement Act.
- IV. Variation of contract by more than 10% was done in disregard of Regulation 31 of the Procurement Regulations.
- V. Inspection and variation of the 34,600 devices was not done prior to deployment. This breached Regulation 17(3) of the Procurement Regulations.
- VI. The Commission failed to adhere to technical advice to cancel the EVID tender before entering into contract. Face Technologies did not have the required infrastructure. This oversight on the part of IEBC largely led to the failure of the system.

## ETRS

- I. IEBC un-procedurally used quotations to procure 5,951 mobile phones at Kshs. 17,847,049.00 and audio-visual equipment at Kshs. 5,078,480. This was well above the Kshs. 1 million threshold for use of this procurement method.
- II. The Commission directly procured WAN connectivity from Safaricom Limited at Kshs.6,132,013 contrary to Section 74 of the Public Procurement and Disposal Act, 2005.
- III. Further, the Commission made an irregular payment of Kshs.480,516 to Airtel Kenya Limited for services not rendered.

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## PART III

### 3.0 WITNESSES AND SITTINGS

The Committee held a total of twenty six (26) sittings in the period of the inquiry, during which it interrogated actors it deemed to be at the core of the audit queries by the Auditor General. The investigations were guided by the aforementioned audit issues.

Minutes of the Committee's Sittings on evidence taken are annexed to this report.

The Committee received evidence from a total of twenty-four (24) witnesses. These comprised of actors in the IEBC at the time, as well as those currently holding offices, and third parties who dealt with the IEBC on the matters raised in the audit report.

### 3.1 FOREIGN SITE VISITS

The Committee made four foreign trips to seek first hand information with key players that had bid for procurement of the devices.

In January 2014, the Committee went to Canada and held discussions with the Canadian Commercial Corporation led by Mr. Don Williamson, a Director of the Corporation. The Committee also met executives of Morpho Canada Inc., and Electrical Services International Ltd. that supplied BVRs to IEBC for a pilot project in various constituencies during the year 2010.

The Committee also travelled to France and held meetings with a team led by Mr. Sebastien Eid, Vice President for sales, Safran Morpho Ltd. The company had been awarded the contract by IEBC to supply the BVR kits that were procured through the arrangement with the Canadian Government.

The trip to India was undertaken in October 2014. The Committee met and held discussions with the Kenya's High Commissioner in Delhi and to Hyderabad city, to meet with 4G Identity Solutions Limited executives to ascertain their capacity, business track record, nature and source of their equipment and an opportunity for the Committee to get the Company's side of the story regarding the disputed exercise.

The Committee then visited South Africa and met executives of Face Technologies. Face Technologies supplied the EVID equipment that was used in the General Election of 2013.

## PART IV

### 4.0 EVIDENCE FROM WITNESSES

#### 4.1 MR. DISMAS ONG'ONDI - FORMER DIRECTOR ICT

Mr. Dismas Ong'ondi appeared before the Committee on 21<sup>st</sup> July, 2015. He informed the committee as follows:-

He was the Director ICT at the audit period, before he was sacked over alleged malpractices in the procurement of the electronic voting devices at the IEBC during the march 2013 General Election.

He joined the IEBC in February 2010 and was dismissed with effect from 2<sup>nd</sup> September, 2013 on alleged failure to provide ICT leadership during the General Election. He had since lodged a labour case at the Industrial Court that was yet to be determined. The Commission Chairman had reached out to him for an out of court settlement, a matter that was in his lawyers hands. He was a prosecution witness in an anti-corruption court case facing former employees of the IEBC.

He is an IT expert with varied qualifications including a postgraduate diploma in Computer Science, first degree in double mathematics, information system security auditor and a holder of a Master of Business Administration Degree (MBA).

The electronic voter registration was conceptualized in 2010 when the IIEC came into place following recommendations of the Kriegler Report. There was a road map consistent with the Commission's strategic plan about how to gradually become electronic. A pilot study was done with electronic voter registration in eighteen (18) constituencies, and in selected constituencies during the 2010 referendum on the new Constitution.

The Commission further undertook study tours to India, South Africa and Brazil. An open day exhibition was done where players in the industry world over were invited to showcase their products based on a set of requirements on voter registration, candidate's nominations and results transmission.

The Directorate of Voter Registration and Electoral Operations headed by Ms. Immaculate Njenge Kassait was the user department and would ordinarily be the originator of sets of desired functional requirements to be addressed by the system. The ICT Directorate would then be required to translate these functional requirements to technical specifications for the tender documents.

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The user directorate however did not formally provide the functional requirements because they were busy in the field and the ICT department went ahead to design a document to the best of their knowledge and ability based on study tours undertaken, research and deliberations during the open day. This was done through constant consultation with the user directorate. The draft document was circulated to the senior management and the Directorate of Voter Registration and Electoral Operations. The Tender Committee then adopted the document and sent it to the Finance and Procurement Department to facilitate procurement.

He categorically advised against the use of EVIDs on the 2013 General Election in an internal memo dated 6<sup>th</sup> December 2012 (Annex. 1). This was based on the following reasons;

- Time constraints – the compressed electoral calendar caused critical activities to overlap. It was not possible to implement the EVIDs project in time for the March 2013 General Elections.
- Doubts about supplier commitment and reliability to deliver the EVIDs solution on time, and according to the tender specifications. The supplier had indicated their inability to deliver the solution on time and according to the tender specifications, citing holiday breaks in China and delayed contracting. In addition, the supplier was unwilling to provide infrastructure and upload the voter registration records onto the EVIDs contrary the requirements on page 32(i) and (ii) of the technical specifications section of the tender document. However, the responsibility of verifying the fidelity (accuracy and completeness) of the data rested with the user Directorate, Voter Registration and Electoral Operations.

His advice was corroborated by an external consultant from the International Foundation for Electoral Systems (IFES) working for the IEBC to give independent advice. On December 7, 2012, the consultant, a Mr. Ronan McDermott issued a briefing note to the Commission which concurred with the advice from the Director ICT on the concerns raised.

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The Chairman of IEBC 'angrily' termed it as "bad advice" and coming too late in the day (Annex. 2). On 10 December, 2012, a Mr. Michael Yard, the IFES Country Director, sent a confidential note to the Chairman of IEBC, providing further justification and reasons for cancellation of the EVIDs project and strongly urged the Chairman to reconsider his determination to proceed with the project.

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The advice came before the contract was signed and it was thus not clear to him on what basis or on whose other expert opinion the Commission relied on in proceeding with the implementation of EVIDs.

His fears were confirmed when BVR procurement delays caused significant repercussions on both the development of Results Transmission System and EVIDs project, thereby causing critical interdependent tasks to overlap. For instance, the delayed procurement of BVR had made it practically impossible to complete registration of voters between 18<sup>th</sup> November and 19<sup>th</sup> December 2012, and have the confirmed Voter Registration data/records ready for transfer to EVIDs after certification.

Until the voters register was certified and gazetted on 18 February, 2013, there was no voters' register to migrate to EVIDs. After certification of the voters register, it was practically impossible to complete the data extraction and upload onto EVIDs, ten days to the election. This also hampered the training of IEBC staff on the use of the devices; some equipment came in as late as 28<sup>th</sup> February, 2013.

The Result Transmission System failed because a server dedicated to this exercise was not put to EVIDs use until three days to the General Election. This compromised test runs activities. Furthermore, the server still contained EVIDs data and this constrained partitioned space. This was fixed but some staff on the ground had already given up on electronic transmission and resorted to manual transmission. The late procurement of EVIDs had a general ripple effect on the effectiveness of the Results Transmission System.

The transfer of data from BVR to EVIDs began before certification was done. This was due to the pressure put by the Commission on the ICT directorate to perform. In some instances, there was discrepancy between the BVR and the EVIDs data.

To remedy the situation in execution of his duties as ICT Director, he gave the following alternative measures to the use EVIDs;

- Use of printed photographic voter lists from the certified biometric voters register (BVR) after removal of duplicate records;
- Exploring the possibility of borrowing voter identification devices from another country like Ghana;
- Conversion of existing BVR kits for use in a pilot run;
- Consideration of second lowest evaluated bidder, provided they were willing and committed to deliver the solution in the available time, and to specifications.
- Proposed amendments to the Election Act to reduce the inspection and certification windows of the voters' register which had clearly come under tremendous time pressure.

He believed expert advice was ignored based on the following reasons;

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- Weak oversight at the Commission – the absence of a Commissioner with an ICT background meant that ICT issues were poorly appreciated at Plenary or that the Plenary took too long to understand those issues.
  - Failure to manage unrealistic key stakeholders’ expectations on the risks and opportunities associated with last minute introduction of electoral technologies very close to election date. The Commission allowed political pressure or personal interests or both to prevail over undisputed expert advice against proceeding with, particularly, EVIDs implementation.
  - A mistaken belief that technology alone could solve all electoral problems without corresponding legal and administrative measures.
  - Possible competing personal interests – the Chairman of the Commission, Mr. Ahmed Issack Hassan, was directly or indirectly (through Commissioner Mohamed Hussun Alawi), lobbying for some vendors to win the BVR (Lithotech and ESI) or EVIDs (Avante International and Face Technology) tenders.

There were specific instances that the Chairman and Commissioner Alawi acted unprofessionally in vouching for personal interests. Some of the instances are illustrated below:-

- During the tendering period for EVIDs in mid to late June 2012 while in Mombasa at the Whitesands Hotel on Commission business, Mr. Hassan allegedly asked Mr. Ong’ondi to meet representatives of Avante International Technology Inc. who were pursuing the EVIDs tender.

The team was led by a retired Maj. Idris who was then working at the Office of the then Prime Minister, and included an Avante employee (whom he learnt had to reschedule his flight to the US that evening to go to Mombasa meet them) and another gentleman from a local logistics Company that was teaming up with Avante.

Mr. Hassan allegedly privately told Mr. Ong’ondi prior to the meeting that the retired major was his personal friend and had crucial links to senior officials in the Coalition Government. Mr. Hassan had wanted him to assist the team to win the tender, and although he actually met them, he tactfully declined the overtures from the firms’ representatives.

- In or around early March 2012, while attending an elections planning workshop at the Nyali International Beach Hotel in Mombasa, Commissioner Mohamed Hussun Alawi, picked him up one evening in his personal car in the pretext of “showing me around town” through his residence in Tudor only to end up meeting a Mr. Abu Joho and Mr. Faraj of Tech Biz, a local ICT Company that was partnering with one of the bidders for BVR, namely Electoral Services International (ESI) Inc. (formerly CODE Inc.) on the BVR tender. The purpose of the meeting was

to discuss the on-going BVR tender. He told them he had no further role in the procurement process and hence could not assist them in any way.

Commissioner Alawi then asked him (Mr. Ong'ondi) to accompany him (Commissioner Alawi) to see some friends of his but he declined. Later the same day, Mr. Hassan allegedly intervened and requested him to accept to meet the said friends, stating that they could not be harmful in any way. Mr. Ong'ondi submitted that he reluctantly accompanied Mr. Alawi to the Tamarind Village where they met a Mr. Musa, who introduced himself as the Managing Director of Kenya Ferry Services, and another gentleman with interests in the media industry whose names he could not remember.

The two gentlemen were partners or representatives of Lithotec of South Africa in the BVR open tender. They wanted to find out if Mr. Ong'ondi could assist them in the tender process, but he stated that he had no further role to play in the procurement process. Mr. Alawi even went further to suggest that they could organize a holiday stay for him (Mr. Ong'ondi) at the Village, but he declined.

- During the evaluation of the BVR tenders, Mr. Hassan attempted to influence the process through a series of short text messages (SMS) to the then Director, Finance and Procurement, Mr. Edward Karisa, asking him to ensure that Lithotech was among the shortlisted firms. Mr. Karisa showed him at least one such text message in his mobile phone. During this time, Mr. Hassan even tried to discredit Face Technologies Pty. of South Africa who had also bid. After Lithotech was disqualified, he switched position to support Face Technologies.
- At a Commissioners' induction retreat at the Travellers Beach Hotel in Mombasa between 17<sup>th</sup> and 26<sup>th</sup> November 2011, Commissioner Mohamed Hussun Alawi, boldly asked him if there were any ICT business opportunities he could pursue at the Commission for his associates who were pushing him. A few months later, upon realizing that ICT was planning to procure an Enterprise Resource Planning (ERP) system, he told him (Ong'ondi) that he could get IEBC someone to do the implementation and started to push for its implementation through the ICT Committee.
- In another instance during the preparation of supplementary budgets for BVR procurement between January and February 2012, the Treasury advised the Commission to review the budgets for this project. The then Director of Finance and Procurement, Mr. Edward Karisa, Director Voter Registration and Election Operations, Immaculate Njenge-Kassait, and himself as Director ICT, in consultation with Mr. James Oswago,

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Commission Secretary/CEO, accordingly proposed to reduce the quantities from 30,000 to 7,250 mobile BVR kits. On reporting this to Chairman Hassan, Mr. Oswago was instructed to ask the team that met Treasury to "choose between working for the Commission or the Treasury". They later bumped into the Chairman by the lifts on their way out from the CEO's office and he reiterated the message.

- o There was no due diligence done by the Commission before procurement of EVIDs. For instance where two employees of the ICT directorate were nominated to travel to China for this purpose but failed to go because they were not informed in good time of the said trip.

The BVR & EVIDs equipment could still be used in subsequent elections as has been demonstrated in by-elections if massive investment could be employed. This will however be difficult because the laptops have a two hour uptime batteries and a whole day's use could require up to six fully charged batteries - a logistical nightmare.

The failure of the equipment was a logistical one and not a functional one. His resignation from the Tender Committee did not in any way hamper technical expertise of the Committee; and there was already a member of staff from the ICT directorate in the Committee. He added that there was a standing Inspection and Acceptance Committee that was to inspect and receive the equipment.

He denied that UNDP was complicit in the failure because their contribution was financial and largely not technical; and may have paid the first instalment of USD 2.5 million.

The data center was internally hosted at the IEBC and the recovery center was outsourced locally. Infrastructure was however not shared with anyone as has been alleged in the media.

#### **4.2 MR. BENARD NYACHIEO, MANAGER LOGISTICS AND ELECTORAL PLANNING**

Mr. Benard Nyachieo, currently Manager Logistics and Electoral Planning, IEBC appeared before the Committee on 22<sup>nd</sup> July, 2015 and 18<sup>th</sup> August, 2015.

He informed the Committee as follows:-

He was the Manager Procurement during the audit period covering BVR and Warehouse Manager during the EVIDs procurement.

The BVR tender was advertised on 15th February 2012. There were a total of 121 questions from the BVR kit tenderers and this necessitated a pre-bidding conference. This resulted in the extension of tender period to 26th March 2012.

The Tender Opening Committee was appointed on 17th March 2012. The bids were then opened 26th March 2012. Twenty nine (29) bids were received. They were availed to the Tender Evaluation Committee which was appointed on 30th March 2012. The evaluation report was tabled before the Tender Committee on 10th May 2012.

The Tender Committee noted that due diligence was not conducted on the recommended company M/S 4G Identity Solution of India by the Evaluation Committee. It therefore recommended for due diligence to be carried out, leading to the CEO to write to the Ministry of Foreign Affairs seeking information on the company. The Ministry responded with an adverse opinion on the company, but the CEO went ahead to disregard this and send a team to India.

The due diligence team to India produced two reports, one signed by all the Committee members. The other report was a dissenting opinion signed by Mr. Abdirahman Bilacha. Mr. Bilacha claimed that the due diligence was not done independently of 4G Company. The clients interviewed were referred to them by 4G itself and could thus not be relied upon. The Tender Committee rejected the due diligence report and the Evaluation Committee's recommendation based on this and unsatisfactory financial analysis.

A financial re-evaluation was done by independent consultants who noted that there was no synergy between the financial and technical scores in the first evaluation report since there was no formula used to correlate the two in arriving at the given ranking of the firms. They recommended M/S Symphony Limited.

The Tender Committee met on 13th July 2012 and rejected the Special Financial Re-evaluation Committee and recommendation of the initial evaluation report that M/S System Integration Ltd (Symphony) be considered through application of margin preference as stipulated under Section 39 of the PPO Act, as UNDP was partially paying and products and materials used to manufacture the equipment were not locally made.

It was then that the Tender Committee resigned on 13th July 2012 citing interference from the CEO. On 16th July 2012, a new Tender Committee was appointed by the CEO.

On 17<sup>th</sup> July 2012, the new Tender Committee met and went through all the three (3) evaluation reports and resolved to reject the lowest evaluated bidder, M/S 4G Identity Solution based on the findings of the due diligence and letter from Ministry of Foreign Affairs and recommended a due diligence be carried out on M/S System Integrated Ltd (Symphony) which was the 2<sup>nd</sup> technically qualified bidder. The due diligence returned an unfavorable verdict leading to subsequent rejection of Symphony Limited.

The Tender Committee recommended that the Commission renegotiate for additional funds to enable the due diligence be carried out on the 3<sup>rd</sup> lowest bidder M/S Face Technology Ltd. On 30<sup>th</sup> July 2012, the CEO terminated the tender. The Chairman released a press statement on 2<sup>nd</sup> August 2012, and announced that in view of time constraints, the IEBC had resolved to use the Optical Mark Reader (OMR Scanner) for the registration of voters.

The matter of "Government to Government" procurement process was brought before the Tender Committee on 11<sup>th</sup> September 2012. During the said meeting, the Tender Committee noted that the Government had taken up BVR procurement process.

The tender process was frustrated from the word go. This was attributed to the CEO due to various reasons. On one occasion before the tender was advertised, a prospective bidder from Venezuela had the tender documents and confessed to the Commission Chairman, Mr. Hassan that it was the CEO who leaked it. Moreover, the CEO allegedly kept pushing him (Mr. Nyachieo) to make sure the tender was skewed in 4G's favour.

In another illustration, the CEO unilaterally appointed members of the Evaluation Committee without consulting the witness who was the then procurement manager, as is the practice. Further still, the CEO replaced three members of the 2<sup>nd</sup> Tender Committee, including the witness, before they could complete their job.

During procurement of EVIDs, he was the warehouse manager. Deliveries of the equipment were done as follows:

	DATE	DELIVERY	ITEM	NO.
1.	12 <sup>th</sup> February 2013	0123	Poll laptop	1175
2.	13 <sup>th</sup> February 2013	0121	Poll laptop	10955
3.	14 <sup>th</sup> February 2013	0122	Poll laptop	3270
4.	28 <sup>th</sup> February 2013	0124	Handheld	2600
5.	26 <sup>th</sup> February 2013	0125	Handheld	2000

6.	21 <sup>st</sup> February 2013	0126	Poll laptop	4600
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The goods were not inspected on delivery as they should have been by the Inspection and Acceptance Committee. He was asked to release them to Kasarani for training purposes. He initially refused to accept the goods but did so after his complaints were ignored. The laptops had no serial numbers and he used a register to release them.

His relationship with the CEO kept fluctuating. He was transferred to the warehouse on 26<sup>th</sup> September, 2012 because of his forthrightness. There was an instance when the CEO asked him to procure Universal Polling Kits but he refused because the supposed user department had not asked for them, and the kits had already been previously bought by supplies department.

#### **4.3 MS. IMMACULATE NJENGE KASSAIT, DIRECTOR, VOTER EDUCATION AND ELECTORAL OPERATIONS**

Ms. Immaculate Kassait appeared before the Committee on 23<sup>rd</sup> July, 2015. She made the following submission:-

She was appointed to the Tender Committee via a memo on 16<sup>th</sup> July 2012 by the Commission Secretary. Following the appointment, the Tender Committee sought clarifications from the CEO on the role of this Tender Committee in relation to the procurement of BVR, considering the previous Committee had already deliberated on the matter. The Tender Committee received communications from the commission secretary clarifying its role. Upon clarification, the Tender Committee deliberated on the procurement of the BVR kits.

The Tender Committee in its meeting held on 17<sup>th</sup> July, 2012 rejected the lowest evaluated bidder, M/S 4G Identity Solution Limited recommended by the Evaluation Committee for the following reasons;

- a) The due diligence from the Ministry of Foreign Affairs via a letter reference MFA.REL.13/12A dated 30<sup>th</sup> May 2012 recommending blacklisting of the company following adverse reports by Unique Identification Authority of India (UIDA).
- b) The due diligence report found that the allegations regarding UIDA Project Bank of India had not been resolved therefore posed a risk.

Based on the aforementioned reasons, the Tender Committee rejected the lowest evaluated bidder, M/S 4G Identity solutions limited recommended by

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the Tender Committee and proposed a confirmation of qualification for the next lowest evaluated bidder, M/S symphony group as per regulation 52(2) of the Public procurement and Disposal Act 2005.

During the Tender Committee's meeting held on 29<sup>th</sup> July 2012, the Committee adopted a due diligence report on M/S symphony group with few clarifications. Upon consideration of the due diligence report, the Tender Committee made a decision to reject the second lowest evaluated bidder M/s System Integration Limited based on nine (9) reasons. The reasons are captured on page 104 paragraph 4.2.2.52 of the special audit report.

In accordance to section 26(3) of Public Procurement and Disposal Act 2005 and Regulations (2)(d) 2006, the Tender Committee recommended that the Commission negotiates for additional funds to enable due diligence on the next lowest evaluated bidder.

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The Tender Committee was summoned to National Assembly by the Constitutional Implementation Oversight Committee (CIOC) and Parliamentary Committee on Justice and Legal Affairs around 2<sup>nd</sup> August 2012 in regard to delays in procurement of BVR system.

The Tender Committee submitted that after due diligence reports ruled out two bidders who had bid within the budgetary provisions, it would require availability of adequate funds to proceed with conducting due diligence on the remaining bidders who had quoted beyond the Commission's budget. About Kshs. 800 million additional funding was required for the tender to consider the next lowest evaluated bidder. She came to learn about the termination of the tendering of BVR through press (411).

The matter of Government to Government was brought before the Tender Committee on 11<sup>th</sup> September 2012. During the said meeting the Tender Committee noted that Government had taken up BVR procurement. She was subsequently discharged of her role as chair of the Tender Committee by the Cabinet Secretary through appointment of another chairperson.

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In November 2011, as the director in charge of Voter Registration during the induction of the IEBC Commissioners, the directorate presented a blue print referred to as '*Seeing Beyond the Horizon*'. The blue print contained options on voter registration. The paper underscored the challenges of rolling out electronic voter registration particularly by competing priorities, uncertainty in the political environment, heavy capital investment and long procurement lead time for international tenders.

Under option I, the directorate proposed to maintain status quo which meant maintaining EVRs in eighteen (18) constituencies while the rest of the country remained with the optical mark readers with necessary improvement. Option II was rolling out EVRs using the existing equipment. Option III was to purchase EVRs for each registration center. The directorate was in favor of option II, which would have been cheaper at a cost of Kshs.892,650,000.00.

It was important to underscore that as the end user, the directorate shared with ICT its requirements during a joint workshop held in September 2011 in Naivasha. In summary the BVR system was supposed to perform the following functions, inter alia;

- Reduce time in data processing.
- Effective method of identifying and eliminating multiple registered voters from the voters' roll effectively.
- Provide multiple methods of identifying voters uniquely.
- Enhance information security and privacy
- Improve integrity and reliability of information e.g. elimination of duplicates.
- Avail On-site and instant data validation and verification
- Increase easy storage and access
- Improve the management of the voters register innovatively.

The directorate communicated officially to the commission secretary via email dated 19<sup>th</sup> January 2012, copied to Director ICT and Director Finance giving timelines for voter registration and underscoring the need for urgent decision making. The directorate wrote to the Commission Secretary via a memo underscoring the efforts the directorate had made towards the EVRs rollout across the country. In the communication it stated the rationale for the 7,250 kits at ward level.

On 13<sup>th</sup> June 2012, in a special meeting of the Elections Technical and Operations Committee, the directorate formally tabled a paper on 'Working within the restricted limits: areas with potential red flags.' The Committee resolved that the paper be re-tabled at a meeting of June 20<sup>th</sup> 2012.

- The paper underscored the importance of voter registration in elections. It mentioned the delay and how this would affect timely delivery of equipment thus putting the kickoff of date for registration in jeopardy.
- It was then proposed that to avoid a crisis there was need to consider plan B, which would hire BVR equipments from other countries or plan C which was configuration of the existing kits.
- This information was communicated to the Chairman and copied to the Commission Secretary via an internal memo dated 2<sup>nd</sup> July 2012 raising the

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Committee's concerns on the delays in rolling out of voter registration. In the memo the directorate of Voter Registration and Electoral Operations underscored the status of the register. The directorate warned against the delay in tendering process and impact on other elections process. The directorate proposed commitment to the timelines; explore other options of securing the kits; establishing of inter-departmental technical committee on voter registration and sharing progress with stakeholders. Following the Government-to-Government agreement, the directorate developed a timeline for BVR roll out.

There were several challenges that were experienced in the implementation of BVR at the Commission. These included;

- Delays in procurement of biometric solution, which took ten months notwithstanding the strict legal and deadlines for voter registration;
- ~~The plan to upload voter register information from the second week after~~ start and confirming to the voters they had been registered did not happen.
- Inquiries pointed to delays in setting up of the data processing center and delay in the delivery of UPS;
- There were some polling centers sharing registration kits thus resulting to so many eligible voters being left out in the registration process.
- In some regions, voters never turned up to register, thus the low turnover on registration which did not translate to the population size and voter kits distributions.

Members of her Tender Committee met again on 11<sup>th</sup> September 2012, and resolved that it had no objection to the Government-to-Government agreement to procure the BVR kits. This was a recommendation given to the Commissioners and her role ended as a chairperson when she made the recommendation as indicated in the minutes annexed.

There was need to urgently make the register production process answerable to the Deputy Commissioner Secretary Operations and specifically Director Voter Registration and Electoral Operation just in the same way the Director Finance, Director Human Resource and Registrar of political parties are responsible for Integrated Financial Management Information System (IFMIS), Payroll and Political Parties Register respectively to help remove snags and anxiety that had characterized register production under ICT directorate since 2010.

#### 4.4 MR EDWARD KARISA - FORMER DIRECTOR, FINANCE AND PROCUREMENT

Mr. Edward Karisa appeared before the Committee on 22<sup>nd</sup> July, 2015.

He submitted as follows:-

In his role as Finance and Procurement Director, he oversaw finance activities of the Commission including procurement. Under him were the Finance, Procurement and Budget departments, each headed by a manager. He was sacked from IEBC in October 2013 and charged in court for not ensuring EVIDs were inspected.

The idea to pursue electronic voting was conceived by the Kriegler report that discouraged the manual system after the post-election violence of 2007. The Commission included the concept in the strategic plan and organized an open day at KICC in 2012 attended by international players. It was after this that the ICT directorate prepared specifications for the desired devices. The Commission then advertised the tender.

The tender faced challenges because the Tender Committee did not award the firm recommended by the Evaluation Committee. The Tender Committee requested for a financial re-evaluation because they felt that the winning bidder did not qualify financially. This back and forth exchange between the Evaluation Committee and the Tender Committee brought the process to a stalemate.

It was after intense discussions that the CEO cancelled the tender. The Chairperson of the Commission announced that exercise would resort to manual registration (OMR). Public pressure led to the Office of the President to advise IEBC that they would help in procurement of the devices.

A budget for 9,750 BVR kits had been set aside to be used to register voters across the country in phases, as agreed with Treasury. Due to time constraints however, 15,000 BVR kits were procured to cover the whole country.

He admitted that he was part of the due diligence team that went to India. He did not know it was irregular for him to be part of the team having been in the Tender Committee. However on the team's return, he did not attend any more of its sittings - even though he remained a member, formally. The 1<sup>st</sup> Tender Committee headed by Praxedes Tororey resolved to look at the evaluation report after the due diligence recommendations.

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The due diligence team discovered that the company, 4G, had integrity issues in India in their previous engagements. The team went straight to Hyderabad, India to meet 4G in order to conduct an independent and objective verification of the High Commission's misgivings. It was IEBC's responsibility to give them a fair chance, and PPOA had in fact not debarred the company.

The Tender Committee had used direct procurement rather than open tendering because of time constraints and the procurement laws allows this. The Commission was under immense pressure. It literally worked 24/7; a situation that one time led to the then Director ICT Mr. Ongóndi to express his frustrations hither to the matter while making an impassioned plea in one of the meetings. Government procurement is very legalistic and could thus not be attributable to one person. There was/are lots of checks and balances.

No such acrimonious procurement had been witnessed at IEBC and there may have been certain on-goings he was not privy to. Even though he did not witness vested interests, he could not rule it out.

The disbandment of the Tender Committee was after long consultations. It was not the CEO's sole decision. This was the Commission's decision and he actually attended some of these consultative meetings. It was thus not possible that the then CEO could have had leeway to take a unilateral decision on a matter as weighty as this

He denied ever receiving a text message from the Chair of IEBC vouching for Lithotec to be shortlisted, as had been claimed by Mr. Ongóndi. He however had several text messages from the Chairman, being close acquaintances having worked together previously. He clarified that the Lithotec issue may have been misconstrued as vouching because during a discussion about the issues Face Technology Ltd. had had in a previous engagement in a South African country; it was Lithotec that had sorted the issues out. The Chairman thus suggested that they had shown greater ability.

The Chairman's assertion that Ongóndi and himself to choose between working for Treasury or IEBC was on a light touch and he did not see it as a serious threat as had been construed by Mr. Ongóndi.

After he was suspended he did not get a chance to hand over the office. The audit team did also not avail him a chance to respond to issues raised during the audit because he never received the invite. He was willing, and the IEBC team headed by Decimah I M'mayi that was to respond to audit queries had initially asked him to assist, only to finally fail to invite him.

#### 4.5 MS. BEATRICE SUNGURA - NYABUTO - DEPUTY CEO, OPERATIONS

Ms. Beatrice Sungura- Nyabuto, the Deputy Chief Executive Officer in charge of operations at IEBC appeared before the Committee on 23<sup>rd</sup> July, 2015. She submitted that is an advocate of the High Court since 12<sup>th</sup> March 1998 and she had previously worked at FIDA, LSK, and in private consultancies before joining IEBC on 3<sup>rd</sup> September 2012.

Her role at the IEBC as Deputy CEO in charge of operations included voter education, electoral planning cycle, managing matters of political parties, voter registration, training of staff, boundaries delimitation, dispute resolution coordination, candidate nominations and general matters election that are not support services. She acted as the CEO for fifteen months after the then CEO James Oswago was suspended and later sacked. She resumed her role as Deputy CEO when the new CEO Mr. Ezra Chiloba was recruited, having been unsuccessful in the recruitment for the substantive post.

She was appointed Chairperson of the Tender Committee on 26<sup>th</sup> September 2012. The Committee soon after adjudicated on the matter of procurement of EVIDs. The Evaluation Committee had done all of the technical evaluation and the Tender Committee awarded Face Technologies the tender. The Committee then recommended as per the law, that a negotiating team be appointed to start negotiations with the winning bidder.

The IEBC had tendered for hand held devices and the tender committee awarded based on the concept demonstration of hand held devices by the vendor. They delivered 4600. The vendor then delivered 30,000 laptops that were not expressly tendered for but provided the same functionality. The witness disclosed that the variation from hand held devices to laptops was reached upon at the plenary, which comprised of the Chairman, Commissioners, the CEO and the Deputy CEO.

The equipment failed largely due to poor battery capacity of the laptops and a lack of training on EVID use by the staff on the ground. This was because there was limited time to train them. She was not aware of the Director ICT's recommendation to cancel the tender.

On the way forward, the 34,600 EVIDs were still in good working condition and a new power/battery solution is what is needed. An IT audit of the whole system including the Results Transmission System is currently underway. The IEBC is also working on a raft of recommendations including the possibility of staggering the elections which is a challenge for both the

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voter and the Commission. The National Government should also facilitate in terms of funding, the IEBC in a timely manner to avoid last minute time constraints and challenges.

She clarified that the tender method used was that of restricted tendering and not a quotation as indicated on page 44 of the Auditor General's special audit report.

#### **4.6 MAJ. (RTD) JAMES O.H OSWAGO - FORMER CEO**

Mr. James Oswago appeared before the Committee on 27<sup>th</sup> July, 2015 and 30<sup>th</sup> July, 2015. He submitted before the Committee as follows;

##### **Biometric Voter Registration Devices**

The Auditor General's report erroneously states or infers that he single handedly mismanaged this process. It states that he was determined that the contract had to be awarded to 4G Identity Solutions of India and that he did everything to achieve this and in the process broke several procurement rules. The report further added that he single handedly terminated the tender without reference or authorization by the Commission.

The Evaluation Team he constituted was the most qualified and consisted of individuals and institutions whose integrity was beyond reproach. Some of these institutions and individuals came from outside IEBC to support the process. The team included the following independent and qualified external experts;

- IFES – Mike Yard
- UNDP – Ronan McDermott
- KEBS – Washington Okoth,
- KEBS – Wilfred Kibii
- ICT – Invited but did not send a representative
- E-Government – Thomas Odhiambo

Out of ten (10) members, six (6) experts represented external bodies either as observers or with full voting rights.

The results were as follows;

## Technical Rankings

Table 6 page 12 of the evaluation report:

M/S Symphony 81.0 %	M/S Face Tech 83.5 %	M/S On Track 82.5%	M/S 4G Identity 80.0 %
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## Financial Rankings

BIDDER	QUOTED PRICE -USD	QUOTED PRICE -KSH	BUDGET - KSH	DIFFERENCE -KSH
4G IDENTITY SOLUTIONS	44,986,500.00	3,729,380,850.00	3,976,654,500.00	(-) 247,273,650.00
AFRICA SYMPHONY	47,547,367.00	3,958,836,831.94	3,976,654,500.00	(-) 17,817,668.06
FACE TECHNOLOGY	57,678,936.00	4,802,400,441.31	3,976,654,500.00	(+) 825,745,941.31
ON TRACK INNOVATIONS	99,444,522.00	8,279,840,951.61	3,976,654,500.00	(+) 4,303,186,451.61

## Final Ranking of Bidders (Evaluated Rankings)

BIDDER	EVALUATED PRICE- IN USD	RANK BASED ON EVALUATED PRICE
4G IDENTITY SOLUTIONS	44,986,500.00	1
AFRICA SYMPHONY	47,547,367.00	2
FACE TECHNOLOGY	57,678,936.00	3
ON TRACK INNOVATIONS	99,444,522.00	4

There was apparent involvement of commissioners on operational functions of the IEBC.

From the above, he could therefore not be accused of pushing for 4G because all expert opinion ranked it first.

The IEBC received three unsolicited advisories from the Kenyan High Commission in India and from the Foreign Affairs Ministry in Kenya. The IEBC had only written to the Indian High Commission in Kenya. The vetting by embassies was however not an express requirement in the bid documents.

It is these unsolicited and negative correspondences that one of the bidders, 4G Identity Solutions, said were as a result of their failure to give bribes. The CEO wrote to the relevant investigative authorities including the NIS

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and the CID requesting investigation of the bribery claims. No response was received. The Commission did not however sit and discuss the letters; they were directed to the Chairman and the CEO only.

When he nominated the due diligence team to India, he relied on the expert advice given by the Director Finance and Procurement who cited section 51(2) of the Public Procurement and Disposal Act, 2005 and Regulations 2006 as read together with Section 52(1). He further submitted that on June 18<sup>th</sup>, 2012, the Tender Committee rejected the due diligence team report, and the UNDP report and insisted that the Tender be awarded to FACE Technologies.

However, according to the report of the Special Evaluation team on Financial Evaluation report, FACE Technologies did not disclose in their bid document Kshs.196,216,259.62 being local transport and taxes. It was also noted that the difference per bid as read out and price in the documents had a difference of Kshs.83,260.90. This committee ignored the financial re-evaluation report and re-awarded the tender to the same vendor.

It was at this point that the CEO wrote to the Public Procurement Oversight Authority seeking guidance. PPOA wrote back advising that the tender Committee could not award to a company that quoted a figure way above budget.

The Tender Committee expressed concern over the continued interference of the tender procurement process and cited some irregularities and coincidences in their minutes of the second meeting which was held on 13<sup>th</sup> July, 2012. These were as follows;

- i. Appointment of a member of the Tender Committee to chair the Tender Evaluation Committee contrary to Regulation 16(4).
- ii. Participation of persons who had not been appointed to the Evaluation Committee
- iii. Participation of Vice chairperson of the Tender Committee in the evaluation process.
- iv. Carrying out of due diligence site visit without specific recommendation by Tender committee or Evaluation Committee.
- v. Constitution of the due diligence site visit team comprising of chairperson evaluation committee and Vice chairperson Tender Committee contrary to separation of authority.
- vi. Casting aspersion on the Tender Committee and accusing them in public of causing delay in the conclusion of the tender process and casting doubt on their integrity in a letter written to PPOA.

The resultant resignation of the Tender Committee paved way for the reconstitution of a new committee which recommended Face Technologies despite its quoting a figure way above the budget. This was after the second Tender Committee rejected 4G, and the second ranked bidder, Symphony.

After failure by IEBC to award the tender, it was actually terminated by the Commission plenary meeting held on 30<sup>th</sup> July, 2012 and is captured under minute 137/7/20/123 (c) , and the decision conveyed to the public by the Chairman of the Commission, and not unilaterally by himself as claimed in the audit report.

He added that he risked his career and life by refusing to sanction the award to a company that had quoted Ksh 1 billion over and above the budget for the items. There had been a push by certain forces in and out of the Commission to influence the tender towards a certain vendor, Face Technologies. The Commissions own Tender Committees broke basic procurement laws and rules in order to achieve this end; including awarding a tender and asking for additional funds to accommodate the awardee, instead of first ascertaining availability of funds as per the Procurement Act and Regulations.

Mr. Oswago clarified that Ms. Decimah's appointment to the Evaluation Committee despite sitting in the Tender Committee, and Mr. Karisa's inclusion in the due diligence trip to India was in good faith. The two never sat in the Tender Committee thereafter, nor did they specifically sit in the tender Committee during the adjudication of BVR.

#### **Government to Government procurement process**

The formal termination of the BVR tender by the Commission was succeeded by Government to Government process. This was after the Government rejected IEBC's decision to resort to OMR.

A meeting was held at Harambee house on 6<sup>th</sup> August, 2012 between the Commissioners and the CEO and the President and Prime Minister. As a result of the meeting, the CEO IEBC formally wrote a letter to the P.S Ministry of Finance confirming that the Commission required 15,000 kits and the equipment must meet the IEBC -BVR technical specifications as set in the tender No. 08/2011-2012. The CEO requested the Permanent Secretary Ministry of Finance to "take the necessary actions to facilitate this acquisition".

On 7<sup>th</sup>- September 2012, The Permanent Secretary, Finance, wrote to the CEO IEBC indicating the G.O.K had entered into agreement with the Government of Canada to 'support' the procurement of the 15,000 BVR kits.

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The Government of Canada appointed the Canadian Commercial Corporation (CCC) to manage the procurement of the BVR kits.

CCC nominated, and the Government approved, Morpho Canada to be the supplier of the 15,000 kits. The Government of Kenya would provide funding for the BVR Kits. Mr. Oswago said that he did not know how financing was arranged; they later learnt that Canada identified a broker, Canadian Commercial Corporation who had international contacts necessary to hasten the process. The financing was sourced from Standard Bank. An offer from France was received but it was felt it was too late in the day and would antagonize Canada diplomatically, since they had already offered.

IEBC became a marginal player, only represented at the Finance Ministry technical committee chaired by Mrs. Otunga and to which the CEO nominated Director ICT & Director Finance. Other members included Caroli Omondi from the Prime Minister's Office, Kennedy Kihara from Office of the president, one advocate from the Ministry of Justice and Constitutional Affairs, and one manager from Department of External Trade.

#### **EVIDs**

Mr. Oswago said that the decision to procure EVIDs including specifications, quantity, vendor and price was a decision of the full Commission sitting in plenary in several meetings.

The 42<sup>nd</sup> Plenary meeting held on 26<sup>th</sup> January 2013 Minute 30/1/2013-30.2 (Annex. 3), was a presentation and demonstration by FACE technology on the functionality of the EVIDs. The Commissioners recommended that a further 3,000 kits should be added to make a total of 33,000 kits.

At the Commission meeting held on 25<sup>th</sup> January 2013, minute 26/1/2013, the Director ICT briefed the Commission indicating that FACE technology had indicated they were only able to deliver 5,000 out of the 30,000 handheld identification devices ordered. The rest would be laptops. This new solution had been subjected to internal and external review by IFES with the conclusion that the solution was feasible. Plenary then advised that the demonstration be re-submitted after clarifying legal, financial, technical and operational concerns. On the 42<sup>nd</sup> plenary meeting held on 26<sup>th</sup> January 2013, minute 249/1/2013, members approved the request to supply the laptop based voter identification devices.

After this procurement, The CEO constituted an Inspection and Acceptance Committee as required by PPOA regulation 17 (1). Memo ref: IEBC/PROC/1 Vol III dated 23<sup>rd</sup> October 2012.

Late procurement of BVRs meant late procurement of EVIDs because they could not be done together. The failure of EVIDs was of an operational nature due to lack of adequate training, battery power and configurations.

The problems were compounded by the vendor's late delivery and late transfer of data from BVR to EVIDs. They also did not do the training in the regions. Their subsequent invoices for further payments were unjustified and the CEO refused to pay.

During elections, it was strange and curious that all of the servers, including the disaster recovery one, had collapsed despite assurances by IFES.

Some Commissioners were often involved in procurement matters including recruitment and deployment of procurement staff including the Procurement Manager whom the Chairman protected despite complaints by the Finance Director. He received complaints from some staff including the then Director ICT about the Chairman and Commissioner Alawi asking him to meet some bidders. This situation was evident in the procurement of lawyers to act for the Commission and were paid up to Kshs. 2 billion as legal fees, some for duplicated roles (Annex. 4).

He concluded that Parliament should clearly delineate roles and responsibilities between Chief Executives and Commissioners to avoid friction.

#### 4.7 MS. PRAXEDES TOROREI, DIRECTOR LEGAL AND PUBLIC AFFAIRS

Ms. Praxedes Tororei, Director Legal and Public Affairs, appeared before the Committee on 4<sup>th</sup> August 2015. During her appearance, she informed the committee as follows:-

On 15<sup>th</sup> February, 2012 a tender advert was placed in the papers inviting bidders for BVR procurement and that the tender was to close on 16<sup>th</sup> March, 2012. Thereafter a pre-briefing meeting was held on 8<sup>th</sup> March, 2012 and an advert was placed on the daily nation newspaper for extension of tender advert deadline to 26<sup>th</sup> March, 2012.

On 30<sup>th</sup> March 2012, an internal memo was issued by the then CEO, Mr. Oswago, nominating members to join the BVR tender evaluation committee. Ms. Decimah M'mayi was appointed as member of the committee, contrary to regulations.

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In addition, on 10<sup>th</sup> May, 2012, the Tender Committee in its sitting looked at the report given to them by the Evaluation Committee and observed that due diligence had not been conducted and thus recommended that it be carried out on M/S 4G Identity solutions Ltd. Her Committee had requested the Manager Finance and Procurement to write a letter to the Ministry of Foreign Affairs and International Cooperation requesting them to facilitate the process of due diligence on the selected company.

On 4<sup>th</sup> May, 2012, the CEO wrote to the Indian High Commission requesting for more details regarding the shortlisted company, of particular being existence of the firm and nature of business it has been undertaking.

On 16<sup>th</sup> May 2012, the Commission received a letter from Safaricom Limited, nominating a Mr. Ronnie Osumba to join the adjudication of the BVRs as an observer.

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Another tender meeting was held on 18<sup>th</sup> May, 2012. At that time, a due diligence report on the firm to be awarded the tender had not been received from the Indian High Commission. On 29<sup>th</sup> May, 2012, the CEO nominated four Members to undertake the due diligence in India, since time was running out.

On 18<sup>th</sup> June, 2012 the tender committee called for a meeting where the due diligence report was presented. The Committee deliberated on the technical and financial evaluation and noted that there was no synergy in the two reports and questioned the criteria used. Members also observed that the due diligence team was not conclusive in their report and that the High Commission had advised against M/S 4G Identity Solutions Limited.

The Tender Committee therefore rejected the evaluation team's report and recommended a financial re-evaluation by an independent team. The Committee then received a financial evaluation report on 30<sup>th</sup> June, 2012 and as a result a meeting was held 2<sup>nd</sup> of July, 2012 to look at the report and make considerations on the procurement of BVR kits.

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Ranking as per the Technical Evaluation Committee had it that M/S Face Technologies were the first, followed by M/S On Track, M/S Symphony and finally 4G Identity Solutions in that order. The Committee was not satisfied with the results and therefore requested for re-evaluation of the four companies and a report be submitted to them.

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On 13<sup>th</sup> July, 2012 it was communicated that the CEO had rejected the award given to him and continued to discuss details of the tender in the

media. On that note, the 1<sup>st</sup> Tender Committee resigned because of various reasons including;

- i. Appointment of a member of the Tender Committee to chair the Tender Evaluation Committee contrary to Regulation 16(4).
- ii. Participation of persons who had not been appointed to the Evaluation Committee
- iii. Participation of Vice chairperson of the Tender Committee in the evaluation process.
- iv. Carrying out of due diligence site visit without specific recommendation by Tender Committee or Evaluation Committee.
- v. Constitution of the due diligence site visit team comprising of chairperson of evaluation Committee and Vice chairperson Tender Committee contrary to separation of authority.
- vi. Casting aspersion on the Tender Committee and accusing them in public of causing delay in the conclusion of the tender process and doubting on their integrity in a letter written to PPOA.

Thus the resignation of the Tender Committee paved way for reconstitution of a new committee.

The witness informed the Members that the Tender Committee did not award M/S 4G Identity Solutions because according to members, the financial evaluation report did not give sufficient information to warrant award. They thus requested a review of the same. The evaluation Committee then recommended M/S Symphony on account of preference but the Tender Committee also checked its viability and realized that the company did not qualify as well.

The Committee did not revert to the firm which had scored high technically but had to consider both financial and technical capability. She later submitted to the Committee a summary of evidence on investigation into the procurement of electronic voting devices for the 2013 general election by the Independent Electoral and Boundaries Commission as shown below;

<u>NO</u>	<u>DATE</u>	<u>ACTIVITY/DOCUMENT</u>	<u>PERTINENT ISSUES TO NOTE</u>
1.	15/11/ 2010	Internal Memo from CEO establishing various Procurement Committees	Members of Tender Committee P.C. Tororey-Chairperson

		<del>together with their functions outlined.</del>	<del>Edward Karisa Dismas Ong'ondi Decimah M'Mayi Lucy Ndungu Tabitha Mutemi Sidney Namulungu Pamela Wandeo B.O Nyachieo-Secretary</del>
2.	15/02/2012	Newspaper advert inviting bids from vendors for the supply of BVR solution. Deadline 16 <sup>th</sup> March 2012.	Commission Secretary/CEO
3.	28/02/12	Minutes of pre bidding conference by BVR tender held at Safari Club Mawingo Hall.	Chairperson-Commission Secretary/CEO Q&A - Director ICT Director Finance & Procurement Director Voter Registration & Electoral Operations
4.	12/03/12	Daily Nation advert for extension of BVR kits and matching solution tender extension from 16 <sup>th</sup> to 26 <sup>th</sup> march 2012.	Commission Secretary/CEO
5.	16/03/12	Tender document for Biometric voter registration (BVR) solution.	
6.	26/03/12	Minutes of tender opening for supply and delivery of BVR kits held at Safari Club Mawingo Hall	Members 1. Chairperson-Andrew Limo 2. Stephen Ekleng 3. Dinah Liech 4. Willie Kamanga
7.	30/03/12	Internal Memo from CEO nominating members to the BVR Evaluation Committee.	Members 1. <del>Chairperson-Decimah M'mayi</del> 2. Col. James Gichuhi 3. Michael Ouma 4. Steve Ikieng

			<p>5. Godfrey Lemiso 6. Washington Okoth 7. Wilfer Kibii 8. Ronan Mcdemott 9. Thomas Odhiambo 10. Reuben Chirchir 11. Secretary-Willy Kamanga</p> <p>Note that Decimah M'mayi was a Member of Tender Committee having been appointed on 15/11/2010 thus amounting to an illegality. <b>Regulation 16 (4)</b> provides that no person shall be appointed in the Evaluation Committee if such a person is a member of the Tender Committee of the procuring entity.</p>
8.	29/4/2012	Tender Evaluation Report	<p>Chairperson - Decimah M'mayi Secretariat - Moses Owuor Samson Owino</p> <p><b>Note:</b> The two members of the Secretariat were not members of the Evaluation Committee as none of them was appointed in writing by the Accounting Officer. It will be noted that Mr. Owuor was neither an employee of the Commission.</p>
9.	9/05/12	Letter from CEO to PS Office of the Deputy Prime Minister Ms. Christine Otunga requesting her to send a representative to attend as an observer in the adjudication process of the BVR kits.	<p>Note that the same letter was sent to CEO Safaricom, UNDP (Dep Country Director) and Country Director IFES.</p> <p><b>Regulation 12(8)</b> where contract is estimated above 50 Million requires observers for transparency. One observer from duly recognized private sector.</p>
10.	10/05/12	Minutes of Tender Committee meeting held on	Minute No 2/15/11 -TC Members received the evaluation report. M/S 4G

		the 6 <sup>th</sup> floor.	Identity Solution, recommended for award.  It emerged that due diligence was not done on the company. Details on the identity, financial capacity, litigation and the company history was not verified.  TC recommended a request to be made to Foreign Affairs to assist in conducting due diligence.
11.	14/05/12	Letter from the CEO to the Indian High Commissioner requesting for due diligence on identity of 4G Identity Solutions for supply of BVR kits	Note that the CEO in the letter was requesting the High Commissioner through the P.S Ministry of foreign Affairs to confirm the following details from 4G: Existence of the firm, nature of business it carries out, financial capability etc.
12.	16/05/12	Letter from Safaricom nominating Mr. Ronald Osumba- Senior Manager for Public Sector to the adjudication of the tender award for the BVR kits.	As an observer from a duly recognized private sector (Regulation 12(8)). (Letter Submitted).
13.	18/05/12	Tender Committee meeting held at the 6 <sup>th</sup> Floor Boardroom	One of the agenda items (no 4), was consideration on procurement for supply and delivery of 9750 boxes of BVR solution.  It was reported that due diligence report on 4G Identity solution had not been received hence the item could not be discussed until receipt of the report. It was deferred to the next meeting.
14.	29/05/12	Internal Memo from CEO nominating a four member	Due Diligence Team 1. Dismas Ong'ondi,

		<p>team to undertake due diligence in India.</p> <p>A letter requesting a nominee to the Team was also forwarded to IFES and UNDP.</p>	<p>2. Decimah M'mayi - Member TC/Chairperson Evaluation Committee(Anomaly)</p> <p>3. Edward Karisa - Vice Chairperson TC (Anomaly)</p> <p>4. Abdulrahman Bilacha</p> <p>5. Godfrey Lemiso</p> <p><b>Note:</b> This Post Evaluation Examination was carried out between the 6<sup>th</sup> and 12<sup>th</sup> June, 2012 by which time the Report from the Kenyan High Commission had arrived advising against entering into any business engagement with 4G Identity Solutions.</p> <p>I wrote a Memo to the CEO pointing out the anomaly in the composition of the due diligence team citing separation of authority. It was ignored.</p>
15.	30/05/12	Letter from the High Commissioner's office to the P.S Ministry of Foreign Affairs regarding request for due diligence on identity of 4G Identity Solutions.	<p>The High Commissioner recommended blacklisting of the 4G Identity Solutions company noting that it had featured in a number of newspapers over certain irregularities.</p> <p>A show cause notice had been issued on the company over a certain assignment in India.(Pertinent notice attached) It also emerged that they had given a different address.</p>
16.	31/05/12	Letter from Ministry of Foreign Affairs to the CEO.	The letter was communicating Kenya's Mission in India's advise that the entity (4G Solutions) <b>should not be allowed to enter into any business transaction with any Government institution in Kenya</b> based on preliminary due diligence it had conducted.
		Letter from Ministry of	Letter is signed by Amb. Abbas forwarded

17.	1/06/12	Foreign Affairs to the CEO referring to the earlier letter of 31 <sup>st</sup> May 2012.	additional information of due diligence on 4G Solution as received from the High Commissioner in New Delhi India.
18.	14/06/12	Letter from the Ministry of Foreign Affairs to the CEO referring to an earlier tele-conversation and letter of 4 <sup>th</sup> June 2012	The letter refers to the CEO's telephone request to the Ambassador on even date regarding information and outcome of due diligence carried out; which was also forwarded.  Note: the same recommendation as of letter dated 31 <sup>st</sup> May 2012.
19.	18/06/12	Minutes of the tender Committee meeting.	The Tender Committee resolved to go through the evaluation report formally presented on 17/05/12.
20.	18/06/12	Reports from IEBC due diligence team	
21.	21/06/12	Observation on tender evaluation report for the supply of BVR solution by Safaricom.	Note the recommendations favour M/S Face technology (submitted).
22.	22/06/12	Memo from procurement Manager B.O Nyachio to CEO proposing that an Independent re-evaluation Committee be constituted (Submitted).	The proposal was based on the rejection of the Tender Evaluation Committee recommendation by the Tender Committee which recommended an independent Committee carry out financial re-evaluation.
23.	25/06/12	Letter from CEO to Victor Majani-UNDP on constitution of a special team on the financial re-evaluation of the BVR	Members were nominated from the following agencies: UNDP, KISM, ICPAK and IFES.

		(Submitted).	
24.	30/06/12	Financial re-evaluation Report for the delivery of BVR kits.	Report submitted.
25.	5/07/12	Internal Memo protesting on the breach of confidentiality from the Chairperson, Tender Committee Praxedes Tororey to the CEO	<p>The Memo outlined the breach of confidentiality most specifically following a publication dated 5<sup>th</sup> July 2012 which alleged that the Tender Committee had delayed submitting its report on adjudication of BVR tender.</p> <p>The Memo sets out the chronology of events thereunder (Submitted).</p> <p><b>Note: Part VIII</b> of the PP&amp;D Act prohibits a procuring entity, employee or agent from disclosing any information which would prejudice legitimate commercial interests of the parties except when ordered to do so by a competent Court.</p>
26.	2/07/12	Tender Committee meeting held at 21 <sup>st</sup> floor boardroom.	<p>Min 8/1/12 – The TC 00022 considered the Report by the Special Evaluation Team on financial re-evaluation.</p> <p>The Report found that the financial evaluation as earlier presented to TC was not exhaustive enough to enable the TC make an informed choice of the lowest evaluated bidder.</p> <p>The Special Team re-conducted the financial ratio analysis to determine the liquidity of the companies and went ahead to apply the margin of preference provided for under the PP&amp;D Act, 2005 and PP&amp;D (Preference and Reservation)</p>

			<p>Regulations, 2011.</p> <p>The TC rejected the recommendation of the special team on financial re-evaluation to award Systems Integration Ltd (Symphony) on account of Preference and Reservations as they did not meet the criteria as set out in S. 39(4) and (8).</p> <p>The Ministry of foreign Affairs had issued a caveat emptor on 4G. The due diligence reports were not satisfactory.</p> <p>Having considered re-submission by the Evaluation Committee the TC made a finding that based on the Technical and Financial evaluations, FACE Technology and On Track Innovations Ltd. were the only two firms with relevant experience.</p> <p>On Track was way off budget at \$99,444,522. FACE Technology, ranked first technically, quoted \$57,678,936, also above budget but had indicated in their financial proposal that the final terms were negotiable.</p> <p>Pursuant to Regulation 11 (4) the TC made its decision and provided an explanation and justification thereof. (Minutes submitted). It further noted that the award was subject to due diligence.</p>
27.	5/07/12	Letter from CEO to M.J.O Juma (PPOA)	<p>The CEO sought opinion on the issue that the TC recommended Face Technology be awarded the tender and rejected the idea of preference in the Symphony case.</p> <p>He further sought advice on whether TC could award tender to a company not</p>

			recommended by the Evaluation Committee.  <b>Note:</b> R. 11 (4) of the PP&D Regulation, 2006 provides that following resubmission of an evaluation report the TC shall make its decision thereof.
28.	11/07/12	Letter from PPOA to CEO on tender for supply of BVR solution.	Response to CEO's letter of 5 <sup>th</sup> July 2012, it noted inter alia that the team also used the financial ratio analysis to evaluate bidder's financial stability. The PPOA's opinion in addition, noted that the TC made the award to Face technologies <b>based on financial proposal that the final terms were negotiable.</b>
29.	13/07/12	Minutes of the Tender Committee held at 21 <sup>st</sup> Boardroom.	The meeting was informed of the CEO's rejection of the Tender Committee award.  TC Members expressed concern over constant leakage of information regarding the procurement process to the media contrary to the law (The Star 14/6/2012; Saturday Nation 16/6/2012; 5/7/2012); negative publicity and subjection to false allegations of delay in the adjudication process.  Members resolved to step aside to safeguard their reputation and allow the CEO reconstitute the Tender Committee (Minutes submitted).
29.	16/07/12	Memo from Chairman IEBC to CEO Re: BVR kits	The Chairman expressed concern over delay in awarding of the BVR tender and the negative publicity the Commission was receiving from the press.

			The CEO was also reminded that Plenary had directed him as the Accounting Officer to finalize and conclude the matter as per the Procurement law(Submitted).
30.	16/07/12	Memo from CEO appointing New Tender Committee and alternate members	The following members were appointed to sit in the Tender Committee: Ms. Immaculate Kassait (Chairperson), Mr. Karisa, Mr. Mabonga, Mr. Ibrae, Ms. Nancy Kariuki, Mr. Jabane, Ms. Liech, Ms. Kiptugen and Mr. Nyachico.
31.	19/9/2012	Legal Opinion on draft contract for purchase of BVR Kits on a Government to Government arrangement.	I advised the Commission that it carried no purchasing authority and had no duty, nor responsibility to engage in the contract.  The MOU dated 29 <sup>th</sup> August, 2012 was between the Government of the Republic of Kenya through the Ministry of Finance and the Government of Canada through the Canadian Commercial Corporation.

In conclusion, the Tender Committee acted most professionally within the confines of the law and upheld its impartiality and independence in the discharge of its mandate. At no time did she insist on wanting to go to India for due diligence. She could only term the allegations attributed to Mr. James Oswago as having been made and carried in the Standard Newspaper of 28<sup>th</sup> July 2015 as outrageous and out-rightly malicious and intended to disparage her person and character.

It was her Committee which insisted on due diligence being conducted on the said firm. To say that she had an interest was most unfortunate. If it were true that the then CEO refused to appoint her to be part of the evaluation team, why did he proceed to appoint yet another member to that

team? She alleged that that argument was nothing but selective amnesia and an unfair attempt to besmirch others for reasons best known to the former CEO. The fact that the CEO did not appoint another member to the due diligence team was proof that the allegation that she had vested interests was designed to besmirch her character.

#### 4.8 MR. ANDREW LIMO, COMMUNICATIONS MANAGER

Mr. Andrew Limo, the Communications Manager at IEBC appeared before the committee on 4<sup>th</sup> August 2015. He submitted that he holds a post graduate diploma in Communications and a Master's Degree in Commerce from Daystar University. He was employed as a training officer on a three year secondment when IEBC took over after IIEC disbandment, then later on worked as a Computer Mediated Officer.

He was appointed as Chairperson to the Tender Opening Committee. After closure of tender adverts, the documents were opened at Lillian Towers. They had twenty nine bidders.

The main responsibility of the tender opening committee was to open the tenders and record the number of bidders then submit a report of the same. In this particular case, bidders demanded that financial proposals be opened and disclosed as well.

Members thought that opening the financial proposals was not right because it defeated the whole process of evaluation. There was need to carry out the technical evaluation. Once results were received, then financial proposals were to be opened in order to consider who was to be awarded the tender.

The team had to consult due to the mounting pressure by bidders who had a feeling of mistrust. They were given a go ahead to open the financial proposals at that point so as to contain the tension in the room.

On the issue of leakage of tender cancellation information to the media, he had received the information from the CEO and the procurement officer. The details of the advert had been sent to him to proof read and check whether it was well written before being submitted to the media. Out of experience, he went ahead to advise the CEO that it was prudent to include a valid reason and explanation to the public as to why the tender was being cancelled.

When the advert leaked out, everyone got surprised since they were caught unawares. They were taken aback since they were still in the process of booking adverts, signing contracts and were expecting the advert to run the following day. Out of experience he was certain that the 411 message

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received had emanated from the news department who got the information from the advertising department.

He informed the Committee that he was not under any pressure to process the advert on termination of the tender but whatever happened, he was only caught in between his line of duty.

#### 4.9 MR. EZRA SIMIYU CHILOBA - CHIEF EXECUTIVE OFFICER, IEBC

Mr. Ezra Chiloba, the CEO IEBC appeared thrice before the Committee; on 5<sup>th</sup> August, 2015, 20<sup>th</sup> August, 2015 and 12<sup>th</sup> October, 2015.

He joined IEBC in February 2015 and was six months old at the Commission. He previously worked in a British/Danish supported Programme in Governance Reforms for one and a half years as Deputy Chief of Party. He spent five (5) years at UNDP in Project Management and Quality Assurance towards support to the Government of Kenya's Ministry of Justice, as well as support in electoral reforms to the IIEC. He also worked with Oxfam in Somalia for six (6) months and he had also worked with Kenya National Human Rights Commission. He is a trained lawyer and holds a Master's degree in Public Policy.

When he joined IEBC six months earlier, the focus has been on the following matters:-

- a. By-elections: Homa Bay, Kajiado, Kabete and Ololua;
- b. Recruiting some of its senior officers including the Director ICT and Director Finance and Procurement Manager;
- c. Strategic Planning and 2017 Elections Operations Plan;
- d. Electoral law reforms consultations;
- e. Annual Voter Education Week;
- f. Pending Bills arising from the 2013 Elections;
- g. 2015/2016 Budgeting process;
- h. Addressing major staffing issues including recruitment of senior officers to replace the suspended ones.

His submission would be largely based on reading the audit report itself and any other documents he might have come across.

The implementation of technology was guided by the provisions of the Elections Act, 2011, sections 39, 40 and 44 which states;

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- ✓ Section 39. (1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.

- ✓ (2) Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.
- ✓ Section 44: The Commission may use such technology as it considers appropriate in the electoral process;

The Elections (General) regulations 2012; Regulation 82 (1) and (2);

- ✓ Regulations 82 (1) the presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such manner as the Commission may direct.
- ✓ (2) The results submitted under sub-regulation (1) shall be provisional and subject to confirmation after the procedure described in regulation 73.

In consideration of the above provisions, the Commission implemented a number of technologies which included;

- a. Biometric Voter Registration (BVR): This is a system that was used for biometric registration of voters by capturing their fingerprints, Photo and demographic data.
- b. Electronic Voter Identification Devices (EVID): This is the system that identifies voter using their fingerprint and photo at the polling station during voting.
- c. Results Transmission System (RTS): This system was implemented to relay the provisional electronic results directly from the polling station to the tallying centres at Constituency, County and National Level.

The invoiced amount of USD 16,867,730 for EVID was paid in full for 30,000 laptop-based devices. In addition, USD 2,553,184 was paid in 2014/15 for additional 4,600 Hand-held devices delivered towards the General Elections.

He was in possession of copies of BVR contracts with Canadian Commercial Corporation and EVID with Face Technologies which he presented to the committee. He also provided payment vouchers made to Face Technologies. BVR vouchers to CCC were in the possession of Treasury as they only got records of figures paid and their percentages.

**IEBC Budget 2012/2013**

Item	Estimate (KES)	Actual Expenditure (KES)	Remarks
Biometric Voter Identification Devices	Kes 6,686,926,691.00	Kes 6,686,926,691.00	The provision was done at supplementary estimate which was equal to the actual amount invoiced and paid.
Electronic Voter Identification Devices	Kes 1,587,500,953.00	USD 16,867,730	The invoiced amount of USD 16,867,730 was paid in full for 30,000 laptop based devices. In addition, USD 2,553,184 was paid in 2014/15 for additional 4,600 Hand held devices delivered later before the General Elections.
Nomination System			System was procured by IFES
Electronic Results Transmission System			System was procured by IFES

He as the CEO had authorized the latter payment of USD 2,553,184 (about Kshs. 258 million) for the 4,600 hand held devices. He did this without a contract because the devices were in the possession of the Commission and had been used in several by-elections. The Commission would not get away from this because the error of their acceptance without a contract variation had been committed already. His authority for payment was supported by reports from Treasury and the Office of the Auditor General. In the same circumstances, he would still pay the amount. He however declined to pay a balance of USD 1.9 million claimed by the vendor because the extra cost was not attributable to IEBC. Moreover, strictly speaking, it was the hand held devices that were contracted.

The RTS system consisted of three main components;

- ✓ Mobile phone Hardware and Software: This consists of the mobile phones and simcard assigned to each polling station. As well as software that runs on each mobile phone. The software was designed to transmit provisional results simultaneously to the three levels at National, County and Constituency tallying centers.

- ✓ Telecommunication infrastructure: The telecommunication infrastructure consisted of the mobile network service providers, modems and the data links to the IEBC servers.
- ✓ Display Hardware and software: This Consists of the outdoor display projectors, at the county, constituency, and national tallying centers, laptops/desktops and the results display software. The results display software was also designed to publish election results in real time to the public and media via a publicly accessible portal [vote.iebc.or.ke](http://vote.iebc.or.ke).

The electronic results transmission system (ERTS) process was abandoned mid-way through voting and the efficacy of the resultant manual transmission of election results. This was because of a combination of factors;

- ✓ Presiding officers experienced difficulties transmitting results due to RTS server slowdown: The server originally procured for RTS was temporarily configured to be used in preparation of EVID data. This process ended two (2) days to the Election Day and was then configured for RTS. This left very limited time for adequate testing of the RTS server configuration. Consequently, the log file filled up the disk space allocated for RTS and stalled the system.
- ✓ Training of the presiding officers was not adequate: Most of the mobile phones and SIM cards for Results Transmission were delivered after the training of the presiding officers had been concluded. Some constituencies received equipment on the night before the election. This meant that officers were not adequately trained on technology or where it was conducted it was not hands-on.
- ✓ Polling station experienced network challenges: Some tallying centers and polling stations had very poor network signal and the service providers were not able to timely boost their network. The network mapping of the commission polling centers and tallying centers using GPS coordinates had not been done. Some areas received Airtel simcards. It was found out later on that transmission on airtel network was not possible due poor network coverage.

The procurement challenges of BVR took valuable time from IEBC election schedule and the adjudication was problematic because the CEO and the 1<sup>st</sup> and 2<sup>nd</sup> Tender Committees made differing decisions.

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Problems with EVID procurement arose when losing bidders challenged the decision at the Public Procurement and Oversight Authority Review Board. The PPOA review board found irregularities in procurement, especially on the financial analysis. This culminated in the cases before courts against former staff of the Commission. The tight timing meant configuration of EVID ended only 2 days to Election Day and before the servers could be fully assembled. The staff were not well trained on EVID use and some areas had poor network coverage.

The CEO added that the Universal Polling kits were delivered save for 5000 metal detectors which arrived in 2014. The Accounting Officer asked the Inspector General of Police to receive. The CEO acknowledged receipt.

The cost of electronic elections is related to the trust of systems by people. Our culture is that of mistrust and hence the tendency to procure the most advanced technology. However it was at fault to say the system was meant to fail, but going forward the Commission is making steps to prevent failure.

The Commission had put in place a new strategic plan that would form the basis of future interventions. The focus of the plan is threefold:-

- Elections that are efficient, effective and credible;
- A respected corporate brand in the provision of electoral services;
- Sustained public confidence and participation in the electoral process.

As CEO he has had to make effort to change staff morale by bringing them closer to the center. The Commission had collapsed communication to one central system, a weekly staff bulletin and a monthly teleconference with the 17 regional coordinators was ongoing to improve services.

Every constituency is represented by an elections coordinator. The decision to transfer them to their home counties for voter registration was his initiative with blessings from the commission's plenary. This was meant to tap into social capital and ensure successful registration.

The role of UNDP where he had worked before was largely technical. It included support to the electoral body after risk and success assessments were done. After accessing more funds UNDP asked IEBC to identify more areas of support and they proposed BVR and EVID. The allocation to BVR was about USD 5 million and EVID was about USD 1.5 million. On the BVR, UNDP paid an initial USD 2.5 million.

UNDP allowed IEBC to conduct the BVR procurement as long as they complied with the law. This support was withdrawn when the Government to Government arrangement came in.

#### 4.10 MS. DECIMAH M'MAYI, DIRECTOR RESEARCH AND DEVELOPMENT

Ms. Decimah M'mayi, the Director Research IEBC appeared before the Committee on 6<sup>th</sup> August, 2015 and 18<sup>th</sup> August, 2015.

She submitted that she joined the then IIEC in 2010 and transitioned with the Commission to IEBC. She had hitherto worked with Telkom Kenya for 20 years rising to the position of Head of Strategy and Regulatory Affairs before opting for voluntary retirement. She holds a Bachelor of Arts degree in Economics, Sociology and Geography.

Her role in procurement was as Chairperson of the Evaluation Committee. She also participated in the due diligence trip to India. She ceased sitting in the Tender Committee of BVR when she joined the Evaluation Committee. This was however verbal as there was no written resignation from the Tender Committee.

She submitted that the tender committee issued an addendum for an extra 30 day notice on top of the advertised 120 days for response, and submitted evidence to that effect.

The evaluation committee ranked 4G Identity Solutions first on the basis of technical evaluation of all relevant paperwork and the due diligence done in India. Her evaluation committee started its work on 4<sup>th</sup> April, 2012 and submitted its report to the tender committee in time, on 7<sup>th</sup> May, 2012 and there was thus no delay attributable on their part. This was within the time frame allowed by law of 30 days for technical evaluation and 5 days for financial evaluation.

The due diligence team to India comprised of the following;

1. Dismas Ongondi- Director ICT and Leader of Delegation
2. Decimah I M'mayi- Director Research and Development
3. Edward Karisa- Director Finance and Procurement
4. Abdirahman Bilacha- Director Risk and Compliance
5. Godfrey Lemiso- Manager Logistics and Operations
6. Margaret Mbugua- Procurement Analyst, UNDP
7. Sayed Farhad Toghian- ICT Associate, UNDP

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~~8. Moses Owuor Director of Programmes, IFES~~

She disputed the audit findings that the evaluation process was not done on an individual basis and said there are different score sheets for all evaluators, before they examined them in plenary. **(The witness however failed to table evidence of the individual score sheets).**

The tender committee however was dissatisfied with the financial report of the evaluation committee and recommended to the CEO that a new evaluation team be set up for that purpose. The role of the Evaluation Committee she chaired ended then.

#### 4.11 MR. WILLY KAMANGA, FORMER MANAGER PROCUREMENT

~~Mr. Willy Kamanga, Former Manager Procurement, IEBC appeared before the Committee on Thursday 6<sup>th</sup> August, 2015.~~

He was seconded to the IEBC from the Ministry of Finance on 14<sup>th</sup> November 2011, but began to act as procurement manager from 29<sup>th</sup> September 2012. He has over 33 years' experience on matters of procurement. He was seconded to assist the incumbent Procurement Manager Mr. Nyachieo. He was not a direct employee of IEBC but was paid by Ministry of Finance while IEBC gave him a stipend to top up. IEBC had requested for a procurement expert and he was the person seconded. He further informed the Committee that once at IEBC his expertise was neither sought nor was information communicated. He was not assigned any duties in his appointment letter nor his position clarified. Duties were assigned to him via memos from the CEO. He was not involved in the procuring of the BVR kits. He chose to leave IEBC after he was taken to court.

The witness submitted that every individual bid was independently evaluated by the Technical Evaluation Committee after which each bid received an average score.

He added that his role in the tender process was limited to drafting the letters to the successful and unsuccessful bidders. He did prepare the letters to both the successful and unsuccessful bidders dated the same day, but could not explain how the dates later changed in that Face Technologies letter read 1<sup>st</sup> November, 2012 the same day they accepted the award, while the unsuccessful bidders' letter were dated 6<sup>th</sup> November, 2012. The law provides for a seven day period for the successful bidder to respond to an offer of an award. On a number of occasions the CEO would delegate the signing of the letters to successful and unsuccessful bidders to him.

He informed the Committee that he was the acting secretary to the Tender Committee. He guided the members on the technical proposals, how to score and he prepared the report. During the tender awarding he held up each physical sample of tendered device for the members to see what they were procuring. The observations in the minutes of the tender Committee show that they awarded a tender for supply of hand-held devices. He was not aware that 5,000 units were hand-held while the rest of the 30,000 units were different.

The witness submitted that he was not involved in receipt of the EVID gadgets as he was not appointed to the Inspection and Acceptance committee. He also did not in any way participate in the Government to Government procurement of BVR.

#### 4.12 IEBC COMMISSIONERS

The Commissioners of IEBC appeared before the Committee on 14<sup>th</sup> and 15<sup>th</sup> September, 2015. Even as they appeared individually, their submission was based on a written submission that is referred to hereunder. The Commissioners were;

- |                                    |   |              |
|------------------------------------|---|--------------|
| 1. Mr. Ahmed Isaack Hassan         | - | Chairman     |
| 2. Ms. Lilian Bokeeye Mahiri- Zaja | - | Commissioner |
| 3. Mr. Albert Camus Onyango Bwire  | - | Commissioner |
| 4. Mrs. Kule Galma Godana          | - | Commissioner |
| 5. Amb. Yusuf Nzibo                | - | Commissioner |
| 6. Eng. Abdullahi Sharawe          | - | Commissioner |
| 7. Mr. Thomas Letangule            | - | Commissioner |
| 8. Ms. J. Muthoni Wangai           | - | Commissioner |
| 9. Mr. Mohamed Alawi Hussun        | - | Commissioner |

The Commissioners role in the procurement process in general is limited to the approval of the budget and procurement plan at the request of management. This was confirmed by the advice of PPOA. Whereas Commissioners would have wished to play an active role in the procurement process, the advisory opinion in reply to management letter Ref no. IIEC/PROC/14/(36) from Public Procurement Oversight Authority (PPOA) vide their letter dated 24<sup>th</sup> May 2010 clarified that this would be a breach of section 38 and 44 of the Public Procurement and Disposal Act (Annex 5).

Further, after BVR tender cancellation by the Commission Secretary, the Commission sought a legal opinion from one of its external lawyers M/s KTK Advocates on the Commissioners' role in the procurement process. On page 3 of their letter they stated as follows; *'Further, under Section 27 of Public*

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*Procurement and Disposal Act 2005, requires that the accounting officers of public entities are responsible for ensuring that proper procurement procedures are followed'. This position concurs with Article 226(2) of the Constitution of Kenya, 2010.*

### **Procurement Plan**

The Public Procurement and Disposal Regulations, 2006 Regulation 20 (1) states that a procuring entity shall prepare a procurement plan under section 26(3) (a) of the Act for each financial year as part of the annual budget preparation process.

Regulation 20 (4); A head of department shall submit an annual procurement plan to the accounting officer at least thirty days before the close of each financial year.

Regulation 20(5); The consolidated annual procurement plan shall be prepared by the procurement unit and approved by the head of the procuring entity and where applicable by the board of directors or a similar body.

As set out above under PPDA regulations 2006, in accordance with the law, the Commission had 2012/2013 Procurement Plan.

The 2012/2013 procurement plan was approved by the Accounting officer (head of the procuring entity) in compliance with regulation 20(5) before being presented by management to the Finance and Procurement committee meeting held on 10<sup>th</sup> August 2012. Consequently, it is incorrect for the Auditor General's special report to state that the same was not availed or not approved.

On the procurement of the devices, Director ICT – Mr. Dismas Ong'ondi's memo dated 6<sup>th</sup> December 2012 was never brought to the attention of the Commissioners. In fact the Commissioners learnt of Mr. Ong'ondi's memo during the Supreme Court Presidential Petition hearing. However, his sworn affidavit dated 19<sup>th</sup> March 2013 to the Supreme Court, paragraph 61-66 goes against his opinion in the memo.

On 25<sup>th</sup> and 26<sup>th</sup> January 2013, the Director ICT Mr. Dismas Ong'ondi presented a paper to the Commission plenary recommending 30,000 laptop solution as the only feasible option (Annex 6).

The Commission believes there was value for money. The IEBC tender for BVR Kits was cancelled on 30<sup>th</sup> July 2012 by the Accounting Officer under powers vested in him by the Public Procurement and Disposal Act 2005.

Prior to cancellation, the Commission vice Chairman's letter dated 16<sup>th</sup> July 2012 to the Commission Secretary expressed its deep concern at the delay and implored the accounting officer to expedite the procurement process within the Procurement law. The Commission meeting of 30<sup>th</sup> July 2012 noted BVR tender cancellation- MIN 136 and 137/7/2012. Consequently following cancellation of the tender by the Accounting Officer, the Commission issued a Press Release and resolved to use Optical Mark Reader (OMR) due to time constraints.

Following cancellation of BVR tender and intention to revert to OMR, there was public out-cry and condemnation of the Commission by the public and major political parties. Following the out-cry the grand coalition Government led by the President and Prime Minister with several Cabinet Ministers and several senior Government officials invited the Commission for a meeting at Harambee House. The coalition Government impressed on the Commission that it was possible through a Government to Government process to make timely delivery of equipment without affecting the commission 2012/2013 budget.

The Ministry of Finance was directed to spearhead the process. As a result of this process 15,000 BVR Kits were delivered to the Commission.

The BVR kits worked well and as a result registered 14,388,781 voters in a period of one (1) month. These kits are still in use today for continuous voter registration in compliance with Article 88(4) of the Constitution.

EVID Kits cost Kshs 1.4 billion (at the then prevailing exchange rate). However, due to challenges of power solution the kits worked part of the day on Election Day 4/3/2013. The same kits have since been used successfully in the over thirty (30) by-elections conducted.

The other challenges that led to sub-optimal performance on Election Day were:

- (i) Clerks not charging fully the EVID kits for the required eight (8) hours.
- (ii) Inadequate training
- (iii) High power consumption due to biometric graphic required for processing
- (iv) Challenges of electric power in most parts of the country; which made continuous charging of kits impossible. Unlike BVR Kits that came with a power pack and in some cases generators, this is not so for EVID kit.

The nomination system was developed in-house and was used for nomination of candidates across the country and for preparation of ballot paper proofs for the 12,776 candidates in the 2013 general elections. The

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system continues to perform very well. We have continued to use this system in the by elections with absolutely no challenges experienced.

The Electronic Results transmission System (ERTS) cost Kes 104,932,231.00. The system was able to transmit 45% of the Presidential results on Election Day then as a result of many layers of data security among others it 'malfunctioned'. This system has subsequently been effectively and efficiently used in all by-elections with excellent results.

The Commissioners role in the procurement process is limited by law under article 226(2) of the Constitution and section 27(2) of PPDA 2005. However, it is our belief that the procurement was done in accordance with the law and achieved the five 'E's namely economy, effectiveness, efficiency, environment and equity.

Presiding officers experienced difficulties transmitting results due to reasons, among them RTS server slowdown. The server originally procured for RTS was temporarily configured to be used in preparation of EVID data. This process ended two (2) days to the Election Day and was then configured for RTS. This left very limited time for adequate testing of the RTS server configuration. Consequently, the log file filled up the disk space allocated for RTS and stalled the system.

Some of the presiding officers received inadequate training on technology.

Some polling stations experienced network challenges because some tallying centers and polling stations had very poor network signal.

The Commission never approved variation of contract on the procurement of EVIDs including change of specifications. What the Commission discussed in its meetings of 25<sup>th</sup> and 26<sup>th</sup> January 2013 was Management request through a plenary paper as articulated. On 26<sup>th</sup> January 2013, the Director of ICT and the CEO presented a report to the plenary on implementation of EVIDs.

It is important to note that though the EVIDs didn't work satisfactorily on 4<sup>th</sup> March 2013, they (EVIDs-hand-held and Laptops) have been efficiently used in the over 30 by-elections so far conducted. The same continue to be deployed successfully and therefore cannot be considered a public loss of funds.

**It was the Commission plenary's expectation that management would implement the resolutions in accordance with the obtaining law as directed.**

Commissioners submitted that they fulfilled their functions in good faith and within the law. The procurement and financial management function has been defined by law including Article 226 and 227 of the Constitution of Kenya 2010, Public Financial Management Act, and Procurement laws.

The matter concerning procurement of EVIDs was investigated by EACC and senior officers of the Commission have been charged. This matter is pending in *Nairobi Criminal case no. 16 of 2013 of Republic vs James Humphrey Oswago & 3 others.*

According to Article 252(3) of the Constitution, the following commissions and independent offices have the power to issue a summons to a witness to assist for purposes of its investigations;

- a) Kenya National Human Rights and Equality Commission
- b) Judicial Service Commission
- c) National Land Commission
- d) The Auditor General

The Auditor General in preparing the special audit never accorded Commissioners an opportunity to be heard as required in Article 47 of the Constitution on Fair Administrative Action. Although the Auditor General has powers conferred on him by Article 252(3) to summon witnesses, he never used these powers to assist him in the investigations.

The Constitutional mandate of whether to source for a loan for procurement of BVR was vested in the Ministry of Finance. This matter was beyond the mandate of the Commission.

#### **4.13 PROF. GITHU MUIGAI, ATTORNEY GENERAL**

Professor Githu Muigai, the Attorney General, appeared before the Committee on Wednesday 16<sup>th</sup> September, 2015. He submitted as follows;

The idea of Biometric and Digitalized Voter Registration system (BVR) was conceptualized by the Independent Electoral and Boundaries Commission (IEBC) as the most appropriate and efficient in system for delivery of a credible voters register pursuant to its mandate under Article 88 of the Constitution.

The BVR system would ensure that the data is captured and managed efficiently in a manner that secures integrity of elections, assures data security and engenders public confidence.

In this respect, the Government made a decision to assist the IEBC to procure the BVR kits through the Government of Canada on a Government

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to Government basis. The Government support was expressed through the various resolutions of the Cabinet Committee on the Implementation of the Constitution.

The Government of Canada offered to assist the Government of Kenya to acquire the kits through a Credit Finance Agreement with the equipment being supplied by a Canadian Company. The financing was arranged through Export Development Canada (EDC), while procurement carried out by the Canadian Commercial Corporation (CCC). The Government of Canada identified the Standard Chartered Bank as the financier and the facility agreement to be signed between the Ministry of Finance and the Bank.

Towards this end, the National Treasury was mandated to request for assistance from the Government of Canada.

Consequently, a technical team was set up comprising of the Permanent Secretaries in the Ministry of Justice, National Cohesion and Constitutional Affairs and the Ministry of Finance, representatives of the office of the Prime Minister, office of the President, the IEBC and the office of the Attorney General to facilitate the negotiations and report to the Cabinet Committee.

The terms of reference of the technical team was specified as follows;

- a. Consider and validate the IEBC technical specifications for the BVR system;
- b. Consider the selection criteria for the selection of the BVR provider;
- c. Develop a Memorandum of Understanding (MoU) to be signed between the Governments of Kenya and Canada, setting out the deliverables and the timelines within which certain deliverables should be met and being cognizant of the timelines set out under the Elections Act, 2011;
- d. Advise on the financial implications of the credit facility from Canada (the Committee would work in consultation with the External Resources Department of the Ministry of Finance on the matter);
- e. Develop a Financial Agreement capturing the spirit of the MoU.

The framework of assistance was underpinned by the Memorandum of Understanding signed by the Governments of Kenya and Canada setting out the general understanding between the two Governments.

The MoU provided for the following things, amongst others;

- a. Facilitate the identification and selection of Canadian suppliers who would be prepared to undertake the obligations of CCC in any

contract signed between the GoK and CCC pursuant to this MoU in respect of the project;

- b. IEBC and CCC to work closely in the identification of the technical requirements of the BVR suitable for the implementation in Kenya;
- c. CCC would identify Canadian suppliers who have satisfied CCC's due diligence test with respect to Canadian supplier's proposal and its technical, managerial and financial capabilities;

By a letter dated 29<sup>th</sup> August 2012 the Attorney General cleared the MoU for signature. Under the MoU, the Canadian Commercial Corporation (CCC) is described as a crown corporation, established by statute of Canada, having its head office in the City of Ottawa, in the province of Ontario, Canada.

*It is an agency of the Government of Canada with a mandate to assist in the development of trade between nations and is committed to the formation of strategic alliances with Governments to facilitate the development of mutually agreeable specific commercial solutions.*

Subsequently, the Attorney General issued a comprehensive opinion on the agreement for the sale and purchase of hardware and license of software for a biometric voter registration system between the GoK through the Ministry of Finance and IEBC and Canadian Commercial Corporation vide a letter dated 18<sup>th</sup> September 2012. (Annex 7)

Materially, the witness submitted that they advised the Government to justify the direct sourcing method adopted for the project, and lodge the same with Public Procurement Oversight Authority (PPOA) as required by Public Procurement and Disposal Act, 2005 at paragraph 5 of the opinion;

*Our view is that this is not necessarily a negotiated loan; the supplier was asked to quote, based on the technical specifications by IEBC and all the GoK is doing presently is discussing overall project delivery dynamics, rather than the financing aspects,-and this is regardless of any export credit guarantees the Canadian Government (through Treasury) has already committed itself to the financing arrangement , but on commercial terms, hence the issues raised above require legitimation by Treasury executing necessary papers justifying the direct sourcing method adopted for this project, and lodging the same with PPOA as required by law.*

~~The Attorney General submitted that they attended subsequent meetings on 18<sup>th</sup> September 2012 and 19<sup>th</sup> September 2012 where the following issues arising from their opinion were discussed:~~

- a. Legal Status of Morpho Canada Inc.
- b. The Procurement process;
- c. Due diligence and integrity concern of the entity;
- d. Effective date of contract;
- e. Payment schedule;
- f. Variation of agreement;
- g. Limitation of liability on CCC;
- h. Exemptions including tax exemptions and pre-shipment inspections;
- i. Governing law and dispute resolution.

~~From the meetings, State Law Office noted that the issues surrounding the procurement and due diligence had not been sufficiently been addressed and thus remained outstanding.~~

The State Law Office had by its advice dated 24<sup>th</sup> September, 2012 to the IEBC and the Ministry of Finance cleared the agreement of execution provided that Ministry of Finance "*assumed responsibility*" for the outstanding issues arising from our opinion of 18<sup>th</sup> September 2012 and the subsequent technical committee meetings. (Annex 8)

By a letter dated 22nd October 2012, the State Law Office cleared the facility agreement of Euro 65 million relying on the commercial judgement of the procuring agency.

By the same letter, Ministry of Finance was further advised to ensure proper due diligence of the financial aspects of the facility agreement and ensure all the conditions precedent are in place as required.

By a letter dated 31<sup>st</sup> October 2012, the Attorney General issued a legal opinion to the Standard Chartered Bank as a condition precedent for effectiveness of the loan facility in accordance with schedule 2, section 2.3 of the facility agreement, whose purpose served to assure the lender that the transaction was lawful and that all the legal process had been followed.

In view of the above, the witness concluded that;

- a. ~~The Attorney General never objected to the signing of the agreement for the sale and purchase of hardware and license of software for a biometric voter registration system between the IEBC and Canadian.~~

*Commercial Corporation* but merely raised legal concerns concerning the transaction that needed to be addressed.

- b. The State Law Office had by its advice to the IEBC and the Ministry of Finance cleared the agreement of execution provided that Ministry of Finance "assumed responsibility" for the outstanding issues arising from our opinion of 18<sup>th</sup> September 2012 and the subsequent technical committee meetings.
- c. As noted in the MoU and the subsequent contract, CCC is described as a Crown Corporation, established by statute of Canada, having its head office in the City of Ottawa, in the province of Ontario, Canada mandated to assist in the development of trade between nations and is committed to the formation of strategic alliances with Governments to facilitate the development of mutually agreeable specific commercial solutions. CCC is described as a statutory entity and recognised as such by the Government of Canada.
- d. The commercial decisions made in the transaction in question were made by the procuring agency to whom on whose behalf we issued the legal opinion to the Standard Chartered Bank as a condition precedent for the effectiveness of the loan facility.

#### 4.14 MR. HASSAN ABDALLA, MANAGER ADMINISTRATION

Mr. Hassan Abdalla appeared before the Committee on 23<sup>rd</sup> September, 2015. He was the Chairperson of the Inspection and Acceptance committee of the IEBC. He is currently the Manager Administration.

He submitted that the Inspection and Acceptance Committee was composed of the following;

- Hassan Abdallah (Chairman)
- Andrew Limo (Vice Chairman)
- Peter Muingai (Member)
- Mary Mwaka (Member)
- Beatrice Njoroge (Member)
- Arnold Wekesa (Member)
- Adan Katelo (Member)
- Isiah Langat (Member)
- KEBS (Member)
- Gabriel Mutunga (Secretary)

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The purpose of the Inspection and Acceptance Committee was to inspect and where required to test goods received, or to inspect and review services, works in order to certify compliance with the terms and specifications of the contract and accept or reject on behalf of the Commission the delivered goods, works, services or consultancy services.

The witness submitted that the functions of the Inspections and Acceptance Committee included the following;

- (i) Inspect and where necessary test the goods received
- (ii) Inspect and review the goods, works, or services in order to ensure compliance with the terms and specifications of the contract.
- (iii) Accept or reject on behalf of the Commission, the delivered goods, works, or services.

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The Inspection and Acceptance committee also ensured that:

- (i) The correct quality has been received.
- (ii) The goods, works, or services meet the technical standards defined in the contract.
- (iii) The goods, works, or services have been delivered or completed on time, or that any delay has been noted.
- (iv) All required manuals or documentation have been received.

Hence the primary task of the Committee was examining of goods that have been delivered to determine conformity with what was ordered via the purchase document. In some cases, the acquisition may require specialized skills or expertise in examining the goods to determine conformance. Inspection also involves the act of testing what is purchased, either all items delivered, or the first item delivered or by random sampling of some or all items delivered. Testing determines that the goods purchased are in conformity with the contract requirements as stated in the solicitation and purchase documents, the supplier's and/or manufacturers' published technical specification and that the goods perform to a satisfactory level.

After completing an inspection of performance test, the Committee provided an inspection report confirming that the inspection/testing has occurred and the goods have passed or failed the inspection /test and the Commission accepts or rejects the product, service or works.

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Mr. Abdallah submitted that the procedure for conducting inspection and acceptance of goods was as follows;

- The procurement department informs the Chairperson of the Inspection and Acceptance Committee about the impending delivery of goods and the exact day and time of the delivery.
- The procurement department also provides the necessary documentation regarding goods to be delivered.
- The Chairperson of the Inspection and Acceptance Committee then informs the Committee members of the same.
- Depending on the nature of goods received the Committee will then make a determination on whether to conduct the inspection itself or it may need additional expertise in order to carry out the exercise.
- The inspection exercise is then carried out and an inspection report is produced and given out to the Procurement Department for their further action.

The procurement of the Biometric Voter Registration kits and the Electronic Voter Identifying Devices was done through an international open tender. The procurement process of the Biometric Voter Registration kits was terminated at some point for reasons not known to the witness, and the central Government was later on involved in the procurement process for the Biometric Voter Registration kits. The procurement of the Electronic Voter Identifying Devices was undertaken to completion.

With reference to the Biometric Voter Registration kits the Chief Executive Officer/Commission Secretary appointed a seven member Ad Hoc Committee via a memo dated 18th October, 2012 to carry out the inspection and acceptance of the Biometric Voter Registration kits. The witness submitted that he was a member of this committee and the inspection for the same was conducted and a report produced. The other members included:

- Dismas Ong'ondi (Chairman)
- Nancy Kariuki (Member)
- Col. (Rtd)J.P. Gichuhi (Member)
- Stephen Ekilen (Member)
- Beatrice Njoroge (Member)
- Abdi Elema (Secretary)

With regards to the Electronic Voter Identification Devices the Inspection and Acceptance Committee was never advised to conduct an inspection of the Electronic Voter Identity Devices. He was informed that factory inspection and testing was supposed to have been carried out on the Electronic Voter Identifying Devices at source. His team was not facilitated to travel. Furthermore the Electronic Voter Identity Devices were

~~immediately dispatched to the field offices upon delivery impeding the inspection exercise.~~

#### 4.15 AMB. ROBINSON GITHAE, FORMER MINISTER OF FINANCE

Amb. Robinson Njeru Githae submitted a memorandum to the Committee, on his role as a Finance Minister during the time of the 'Government to Government' procurement of BVR. He is currently the Kenyan ambassador to the United States of America.

He submitted that the procurement moved from IEBC, an independent body, to Government to Government arrangement when I.E.B.C issued a press statement that they had cancelled the tender for the procurement BVR kits and consequently they would use manual system for the 2013 General Election.

~~Both P.N.U and O.D.M coalition parties stated categorically (but for different reasons), that they would not participate in 2013 general if it was conducted manually and more so if there were no BVR Kits for voter identification purposes. There was panic and pandemonium in Government circles as a result of the IEBC decision.~~

Amb. Githae submitted that he did not have the specifics of budgetary allocation towards the procurement and that they could be accessed from Treasury.

He clarified that the rationale of seeking an expensive external loan (Principal of Euros 65,152,629) was because I.E.B.C refused to surrender back to the National Treasury the funds that had been allocated to it for the procurement of BVR Kits to enable G.O.K now to procure them. IEBC claimed that they would therefore use the said funds to purchase other election materials that had not been funded by National Treasury.

Moreover, the Government had no funds to pay for the BVR Kits. The Government overdraft at the Central Bank of Kenya had been exceeded and the latter was not prepared to increase it even on temporary basis. The tax revenues from K.R.A were decreasing. K.R.A was not meeting its targets and ~~the targets had to be revised downwards to reflect the actual and true position.~~

The loan was paid up front, in order to save lead time on the disbursement of the loan as the BVR Kits Manufacturers stated they would only start assembling them once they had been paid. If the Government had not paid upfront, the BVR Kits would have been received after the election and not before. Time was of the greatest essence.

~~The upfront payment was obtained by temporarily freezing exchequer issues to ministries in order to build up the cash reserves at C.B.K. Once the loan proceeds were received from Canadian Commercial Corporation, the freeze on exchequer issues was immediately lifted.~~

Amb. Githae added that Canadian Commercial Corporation is not a broker. It is the commercial arm of the Canadian Government. All Canadian Government Commercial transactions are routed through Canadian Commercial Corporation, and is the equivalent of JICA (Japan), or GTZ (Germany). Most donor countries have such an arm including U.S.A, UK and France.

The Ambassador maintained that there was therefore no such loss of Euros 2,676,628.80 pertained to 'brokerage'. This was the mandatory cost of the loan including:-

- (i) Application fees
- (ii) Appraisal fees
- (iii) Commitment fees
- (iv) Disbursement fees
- (v) Guarantee fees
- (vi) Revolving facility fees
- (vii) Default fees
- (viii) Renegotiation fees
- (ix) Balloon payment fees
- (x) Actual interest rate charges.

He submitted that he was not aware of the specific details of the proposed alternative financing by the Government of France, but the proposal was put on hold by G.O.K because there was neither sufficient nor adequate time to election date to proceed on two or more simultaneous negotiations of the loan. Time was of the greatest essence. Some tough decision had to be made for the sake of the country and they were duly made. As far as the witness was concerned, it turned out Safran Morpho of Canada is the same Safran Morpho of France.

The former Finance Minister stated that he was not aware that the Attorney General advised against entering the contract. According to him, the Attorney General was in fact a ranking member of the Cabinet Committee that was implementing the Constitution and the purchasing of BVR Kits. His office was thus fully involved in the negotiations as far as he could remember.

Amb. Githae completed his submission by saying that National Treasury saved the country from possible election violence because if the BVR Kits had not been procured, and thus deserves commendation for the swift decisions that it took.

#### **4.16 MR. JOSEPH KINYUA, FORMER PERMANENT SECRETARY, MINISTRY OF FINANCE**

The Chief of Staff and Head of Public Service Mr. Joseph Kinyua appeared before the Committee to adduce evidence on the Procurement of Electronic

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Voting and Registration Devices for the 2013 General Election by the Independent Electoral and Boundaries Commission (IEBC).

Mr. Joseph Kinyua informed the Committee that:-

**(a) Procurement of BVR Devices**

- (i) Following the decision by the Cabinet that the IEBC proceeds with Biometric Voter Registration (BVR) system, IEBC initiated the process vide their letter dated 7<sup>th</sup> August 2012, requesting the Permanent Secretary, Treasury for procurement of 15,000 BVR kits on Government to Government basis, at an estimated cost of Kshs. 6,191,640, 000.
- (ii) The Cabinet Committee on Implementation of the Constitution during its meeting on 9<sup>th</sup> August 2012 directed the Ministry of Finance to initiate the Government to Government process of securing assistance from the Government of Canada to enable IEBC procure Biometric Voter Registration (BVR) System by the deadline of 30<sup>th</sup> September 2012.
- (iii) The Cabinet also authorized formation of a Technical Committee to play an oversight role in the procurement process, while IEBC who has the responsibility to conduct and supervise elections remained responsible for the procurement of the BVR kits.
- (iv) The Technical Committee was to ensure that the timelines were observed and to prepare the MOU for the Government to Government procurement. The members of the Technical Committee comprised the Ministry of Finance, Office of the Prime Minister, Ministry of Justice, National Cohesion and Constitutional Affairs, Office of the President, IEBC and Representatives of the Attorney General. The Technical Committee was to report to the Permanent Secretaries' Committee comprising Office of the President, Office of the Prime, Minister Ministry of Finance, Ministry of Justice, National Cohesion and Constitutional affairs.
- (v) IEBC was wholly responsible for the technical specifications and the actual execution of the procurement of the equipment while the Ministry of Finance was responsible for financing. The Minister for Finance wrote to the Government of Canada on 9<sup>th</sup> August 2012 requesting for the Government-to-Government financing of the procurement of the BVR kits. The Government of Canada confirmed their financial support in their letter dated 18<sup>th</sup> August 2012.
- (vi) The Cabinet Committee was apprised of the progress made by IEBC with respect to the specifications and timelines set for the delivery of the

BVR kits. The Committee was satisfied with the progress and directed the then Minister for Finance to communicate to the Government of Canada. During this Cabinet Committee's meeting the Office of the Prime Minister presented an offer from the Government of France to support the procurement of the BVR kits. After some deliberations, it was resolved that since the Government had already engaged the Government of Canada, it was inappropriate to engage with another development partner on the same issue. The then Minister for Finance subsequently communicated with the Government of France, thanking them for the gesture but indicated that GoK was already with the Government of Canada and discussion were at very advanced stage.

- (vii) The Export Credit facility by the Government of Canada is operated through the Canadian Commercial Corporation (CCC), which acts on behalf of the Government of Canada as the contracting Agency. The Export Development Canada (EDC), also a body of the Government of Canada, acts as the insurer providing guarantee for the credit which would be provided by a recognized bank.
- (viii) As part of the process for securing the credit, GoK was to sign a Memorandum of Understanding with the CCC, acting on behalf of the Canadian Government. After clearance from the Attorney-General, the MOU between the GoK and the CCC, was signed on 29<sup>th</sup> August 2012 laying the framework for Government-to-Government cooperation. According to MOU the Canadian Government was to identify the supplier.
- (ix) The Canadian Government recommended two potential Canadian suppliers: a consortium of Canadian Bank Note Company (CBNCO) and Electoral Systems Identification (ESIO, formerly code Inc.); and the Canadian Office of Morpho Technology. The consortium required up to one month to start the work while the second company was ready to begin in two weeks. Given the tight timelines, IEBC preferred the second option of the Canadian Office of Morpho Technology.
- (x) The signing of Memorandum set the stage for the CCC, as the agent of the Canadian Government, to engage with the Independent Electoral and Boundaries Commission (IEBC) to work out the details of the procurements of the kits.
- (xi) The Agreement for the sale and purchase of the hardware and license for the software for the BVR System was signed on 24<sup>th</sup> September between CCC, GoK (through the Ministry of Finance) and IEBC.

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(b) **Budget Allocation to IEBC for Procurement of the BVR devices,  
Financing Arrangements and the Actual Amount Spent.**

**Budget Allocation**

IEBC required Kshs. 6,191,640,000 for procurement of BVR machines.

The funding had not been initially provided for in the year 2012/2013 financial year budget for the IEBC but Treasury approval for the additional funding was later given and regularized in the Supplementary Estimates I for the 2012/2013 financial year.

**Financing Arrangements**

Owing to time constraints, it was preferred that the provisions for this procurement be financed through external borrowing in line with the Cabinet directive as opposed to the usual financing through domestic revenues/external borrowing or through grants.

The Government of Canada through CCC, presented to the Government of Kenya that the Standard Chartered Bank UK was willing to finance the project as the lender.

The Ministry of Finance secured a credit facility of **Euro. 65, 152,629** from Standard Chartered Bank UK as per copy of the finance agreement dated 25<sup>th</sup> October, 2012.

**Actual Amounts Spent**

While awaiting the disbursement of the loan proceeds, CCC required an advance payment to enable them to make arrangements for the production and delivery of the gadgets in good time for the elections. It became necessary therefore that part of the Exchequer issues earlier on availed to IEBC be used to pay the hardware and license of software for the BVR System.

To make payments for the CCC towards the BVRS, IEBC requested the Treasury to make payments in EUROS by way of Payment Advises (Pas).

To make payments on behalf of IEBC, equivalent amounts in Kshs. Were transferred from IEBC into deposit account no. 01-010-E007 for the Ministry of Finance -E7, for onward transmission to CCC. The money received from IEBC to the Ministry of Finance was therefore not received into the Consolidated Fund. The total amount transmitted to CCC was **Euros 56,209,189.69** equivalent to **Kshs. 6, 287,482,264** for the acquisition of the BVR equipment.

The first 40% installment was payable upon signing of the agreement and an amount of **Euro 22, 483,675.87** equivalent to **Kshs. 2, 476,498,204** at an

exchange rate of 110.1465 per Euro was released to CCC by the Central Bank of Kenya on 24<sup>th</sup> October 2012 vide STD02012 through PA No. 105646.

The 60% balance of the total sum of the contract for the sale and purchase of hardware and license of software for the BVRS was released by the Ministry of Finance on behalf of IEBC, through processing Ref. No. 061090000050177 amounting to **Kshs. 3,810,983,060.00** converted to **Euro. 33,725,513.81** on 26<sup>th</sup> October 2012 vide STD261012, at an exchange rate of 112,99 per Euro as per PA No. 105650.

The balance of Euros **8,943, 439.00** of the loan was used to pay for the insurance premium cover for the loan.

The Standard Chartered Bank, UK disbursed the loan proceeds as follows:-

On 9<sup>th</sup> November, 2012 Euros **8,943, 439.00** was released to EDC Canada as payment for the insurance premium cover for the loan.

**Euros 56,209,189.69** of the loan facility initially disbursed to CCC reimbursed to the Treasury and received into the deposit account No. (old) 01-010-1007, New account no. 1000122315 as per the table below.

DATE	AMOUNT (EUROS)
14.11.2012	25,294,135,36
14.11.2012	22,483,675.87
28.11.2012	2,810,459.48
28.02.2013	5,620,918.97
<b>TOTAL</b>	<b>56,209,189.68</b>

No loss was therefore incurred from the above transactions.

### (c) Rationale for Seeking External Financing for the BVR Devices

It was preferred that the provision for this procurement be financed through external borrowing in line with the Cabinet directive.

The loan negotiated between GoK and the Standard Chartered Bank UK was commercial and cheaper than the syndicated loan contracted in May 2012 since EDC provided a guarantee. This is reflected in the lower interest rate margin of 2.75% compared to 4.75% for the syndicated loan. However there was a premium or the guaranteed 1.59% and a fee charge by CCC of 0.5% of the facility. All in all the cost for the facility was 5.12% p.a.

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**(d) Justification for Engaging Canadian Commercial Corporation instead of the Engaging the Canadian Government Directly**

The Minister for Finance wrote to the Government of Canada on 9<sup>th</sup> August 2012 requesting for the Government-to-Government financing the procurement of the BVR kits. The Canada confirmed their financial support in their letter dated 18<sup>th</sup> August, 2012.

Further the Export Credit Facility by the Government of Canada is operated through the CCC, which acts on behalf of the Government of Canada as the contracting agency. The Export Development Canada ((EDC), also a body of the Government of Canada, acts an insurer providing guarantee for the credit on behalf of the Government of Canada.

The GoK therefore directly engaged the Government of Canada, which then provided the CCC and the EDC to handle the matter on her behalf.

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**(e) Details of the Proposed Alternative Financing by the Government of France, and Reasons for GoK's Rejection of the Offer Leading to Direct Procurement from Safran Morpho**

**(i) Proposed Alternative Financing by the Government of France**

The Cabinet Committee during its meeting on 17<sup>th</sup> August, 2012 was apprised of the progress that had been made particularly by IEBC with respect to the specifications, qualifications and timelines set for the delivery of the BVR kits. The Committee was satisfied with the progress reported and it directed the then Minister for Finance to communicate the documents for the specifications, qualifications and delivery timing to the Government of Canada.

**(ii) Procurement from Safran Morpho**

During the same Cabinet Committee's meeting the Office of the Prime Minister presented an offer from the Government of France to support the procurement of the BVR kits. After deliberations it was resolved that since the Government had already engaged the Government of Canada, it was not appropriate to engage with another development partner on the same issue. The then Minister for Finance subsequently communicated with the Government of France thanking them for the gesture but indicated that GoK was already engaged with the Government of Canada and that discussions were at an advanced stage.

The Canadian Government recommended two potential suppliers: a consortium of Canadian Bank Note Company (CBNCO) and Electoral Systems International (ESI, formerly CODE Inc.); and the Canadian Office of the Morpho Technology. The consortium required up to one month to start the work while the second company was ready to begin in two weeks. Given

the tight timelines, IEBC preferred the second option of the Canadian Office of Morpho Technology.

**(f) Failure to heed the Advice of the Attorney General against Entering into the Contract**

The Cabinet authorized the formation of the Technical Committee to play an oversight role in the procurement process. The Committee was to ensure that the timelines were observed and to prepare the MOU and other contract documents for the Government-to-Government Procurement. The Attorney General was represented in the Technical Committee whereby they provided the legal guidance towards entering the contract.

The Attorney General provided a written concurrence in support of entering into the contract vide his letter Ref. No. AG/CONF/21/54/1 VOL. I (41) dated 22<sup>nd</sup> October 2012.

**Committee Observations**

The Committee observed that:-

- (i) Single sourcing of the BVR kits from the Canadian Commercial Corporation through the Canadian Government by the Government of Kenya was not necessarily the best and most prudent method to use in procuring BVR kits using public resources inspite of the time constraints. It was therefore unlikely that the Government got value for money.
- (ii) PPDA, 2005 allows for single sourcing if justified by the circumstances and when there is no time to go through the tendering process. IEBC had all the time to follow the tender process and procure the BVR kits in time and the lack of time should have fallen naturally and not created by the Commission's failure to carry out the process in time.
- (iii) The MOU signed between the GoK and the Canadian Government required that only Canadian companies shall supply the kits however the kits were eventually supplied by French company **Safran Morpho** and at a higher cost than what it would have charged were it engaged directly by GoK/IEBC.
- (iv) The offer to supply the kits by the Government of France from the was turned down and the then Cabinet Secretary, Finance curiously wrote to the Canadian Government asking them to urgently confirm their offer and fast track negotiations on supply of the kits.

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- (v) ~~The role of the Committee chaired by the former Prime Minister and the Cabinet Sub-Committee was only advisory and was to ensure that the procurement process is completed successfully.~~
- (vi) The choice of Sapran Morpo to supply the kits was informed by an earlier engagement with IEBC and was not a preference to any of the members of Ministry of Treasury, Cabinet Sub-Committee or Office of the Prime Minister.
- (vii) There are allegations that Canadian Commercial Corporation received an over Euros 200 million as agency fee.
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## PART V

### 5.0 OBSERVATIONS AND FINDINGS

#### General observations

In calling for evidence, the Committee was guided by Article 125 of the Constitution which gives it the same powers as those of the High Court. It is stated that:-

1. *Either House of Parliament, or any of its Committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information.*
2. *For the purposes of clause (1), a House of Parliament and any of its Committees has the same powers as the High Court—*
  - (a) *to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise;*
  - (b) *to compel the production of documents; and*
  - (c) *to issue a commission or request to examine witnesses abroad.*

After due consideration of submissions and evidence adduced, the Committee makes the following observations:-

1. While the IIEC had laid down structures of electoral reform, the new IEBC took too long to operationalize the changes. The new Commission largely had staff transitioned from the IIEC/IEBRC including Regional Electoral Coordinators and three Commissioners among them the Chairman Mr. Isaack Hassan and Mr. Abdullahi Sharawe. A successful pilot of electronic voter registration was previously done in eighteen constituencies. The Commission either took for granted the desire by Kenyans to avoid a repeat of the 2007 post election violence or under-estimated the possibility of Kenyans going back down that road. Subsequent failure of these devices on Election Day had the potential to re-ignite simmering tensions.
2. Elections are more of a socio-political practice than they are a legal process. The Commission did little to inspire public confidence, leading to widespread outcry and condemnation when it was announced that they would resort to the Optical Mark Reader, after the tender for BVR was cancelled. During submission, officials of IEBC seemed to have a misplaced self belief and an over reliance on technicalities. This is further evidenced in their post election evaluation report that fails to capture the salient failures of the Commission.

3. Elections in Kenya have become an expensive exercise due to mistrust among Kenyans. This has pushed the pursuit of 'tamper proof' ICT systems that have come at great expense. These systems however, will do little if not complemented with proper training and integrity of electoral staff. Evidence submitted indicates that the failure of the equipment was largely attributed to human failure due to inadequate preparations. In some technologically advanced countries like the UK, elections are still manual and results are accepted by all. In developing democracies, the per capita spending on elections is estimated at \$1 and \$3 per person and voter respectively. The cost of conducting elections should be proportionate with the registered voters. In Kenya registered voters stand at 35% compared to India with voter listing at 67% of the total population. There is need to institute austerity measures in determining the cost of conducting elections and rationalize the budget items to reflect the urgency and importance in achieving value for money and ensuring successful conduct of democratic elections come 2017.
4. The Government's intention to procure the BVR devices for IEBC was in the public good, given the circumstances. The IEBC failed to utilize the Kshs.12 billion budgetary allocation even after prodding by Treasury (Annex 9). The Commission had abdicated its duty. The intervention by the Government was meant to prevent the country from entering into a potential state of uncertainty with manual elections, even though the execution to procure was not done properly.
5. Governance at the Commission was poor with apparent mistrust between Commissioners and the CEO, and within the secretariat itself. There were constant media leakages with the Chairman at one time intimating that the Star Newspaper was like a "notice board" within the Commission. The first BVR tender Committee resigned citing interference by the CEO. The Commission itself learnt of the cancellation of the BVR tender through breaking news text message alert, 411. There was no healthy communication line at the Commission; at most times the communication between the Commission and the secretariat was acrimonious.
6. The failure by IEBC to procure BVR was a result of vested financial interests pitting the Commission against the secretariat. Accusations and counter accusations compounded by contempt among the opposing camps during submissions paints a clear picture of an organization at war with itself. Expecting a better outcome in the procurement process would be overly optimistic.
7. The former CEO cited various instances of interference by the Commission in operational matters. The Chairman intervened in (re)

deployment of staff within the Commission as evidenced by one instance involving Mr. Bernard Nyachieo (Annex. 10). Evidence by the former CEO was that these actions handicapped his control of the secretariat. The Chairman also personally appointed lawyers to act for the Commission in the Supreme Court petition (Annex. 4). This exposed the Chairman as participating in the procurement by IEBC.

8. The Commission Secretariat had poor record keeping and/or was deliberately unwilling to provide documentation. The Evaluation Committee, for instance, could not produce individual score sheets for the BVR tender process.
9. IEBC has far too many Directorates, currently standing at nine. Some of these Directorates had overlapping functions. There was apparent duplication of roles from such Directorates as Voter Registration and Electoral Operations, Voter Education and Partnership, Research and Development and Information, Communication and Technology (ICT) to the extent that the competing nature rendered operations ineffective and created confusion at the IEBC.
10. During submissions by the IEBC Commissioners, it was apparent that majority of them could not satisfactorily explain to the Committee their daily routine work, in a full day's engagement. The Committee was of the view that the involvement of the Commissioners in administrative and operational roles vested in the Secretariat could have been occasioned by lack of full time duties for the Commissioners.
11. In conducting investigations of this nature, the Committee was of the view that evidence being adduced by the witnesses could be of great benefit to the Ethics and Anti-Corruption Commission (EACC) and the Office of the Director of Public Prosecutions (DPP); who could launch immediate investigations and prosecutions based on the real time information, without necessarily waiting for Committees' recommendations.

#### **Procurement of BVR at the IEBC**

12. The Committee finds that the Commission's procurement was not guided by a procurement plan, or that the plan was inadequate, or both. The timing of procurement of devices was so tight that it indicated that this process was deliberately designed to fail despite Treasury allocating Kshs.12 billion.
13. The Accounting Officer broke basic procurement rules. Witnesses submitted that the procurement process was faulty *ab initio*. The mismanagement of the process saw the taxpayer spend an extra Kshs.2.2 billion.

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14. The Accounting Officer constituted the Tender Evaluation Committee and the delegation to India for due diligence in disregard of the law. Ms. Decimah M'mayi and Mr. Edward Karisa were appointed to the Evaluation Committee and due diligence trip to India despite having served in the Tender Committee. Ms. M'mayi thereafter 'verbally' stepped aside from the Tender Committee. The appointment of these persons to the Committees was in direct contravention of Regulation 16 (4) of Public Procurement and Disposal Regulations 2006.

The 1<sup>st</sup> Tender Committee resigned in a huff citing various reasons generally castigating the CEO for interference. The due diligence report from India was not properly done. Apart from un-procedural composition of the team, the group returned with a dissenting opinion by one of the members. These procedural discrepancies could have led to rejection of award to 4G technology by the Tender Committee.

Even though the Public Procurement and Disposal Act 2005 Section 36 empowers the CEO to terminate a tender, it would have been prudent for the accounting officer to have consulted the tender committees that had handled this procurement all along.

15. There were vested interests in the Commission. It was alleged that the Chairman, Mr. Isaack Hassan and Commissioners Mr. Mohamed Alawi Hussun and Mr. Thomas Letangule and others in the secretariat fronted Face Technologies. It was further claimed that the CEO favoured 4G Identity Solutions. This is what led to the stalemate during procurement culminating in the CEO terminating the tender. The Chairman claimed executives of bidding companies used to visit the CEO's office and not his.

16. The 2<sup>nd</sup> Tender Committee led by Ms. Immaculate Kassait recommended award to Face Technologies which had quoted Kshs. 825,745,941.31 above budget. This was in direct contravention of Regulation 10(d) of the Procurement Regulations as well as Section 26 (3) of the Public Procurement and Disposal Act, 2005 that require that a Tender Committee awards within available funds.

17. There was no evidence of the evaluation team conducting individual evaluation of the bidders contrary to Regulation 16(6) of the Procurement Regulations 2006 that states;

*"Each member of the technical evaluation committee shall evaluate independently from the other members prior to sharing his or her analysis, questions and evaluation including his or her rating with the other members of the technical evaluation committee."*

#### **Procurement of BVR by the Government**

18. After the inability by the Commission to procure BVR equipment, the Grand Coalition Government responded to general concerns by key

stakeholders by offering to finance the procurement of the devices for the IEBC.

19. The essence of a Government to Government procurement was for the borrowing Government to access favourable financing terms from a friendly nation, for its development objectives. This process was undermined by Treasury officials who saw the procurement as an avenue to legitimize a process that was marred by irregularities.

20. The manner in which this procurement was financed by a loan from Standard Chartered bank, brokered by the Canadian Commercial Corporation saw the taxpayer incur extra costs of at least € 36,989,937.52 (Kshs.4,087,388,095.96) plus € 2,676,628.80 (Kshs. 295,767,482.40) as brokerage fees. This process was a single sourced procurement under the guise of Government to Government undertaking. In fact, supply was done by a firm registered in France and not Canada.

21. The advice by the Attorney General addressed in his letter to the then Permanent Secretary and the Chairman Mr. Isaack Hassan was not fully factored in the decision to revert to Government to Government procurement (Annex. 7). This had the potential of exposing the country to foreign litigation and fines as was seen in the Anglo leasing case.

Moreover, the Government should have at least considered alternative sources of financing as had been proposed by the Government of France. Worse still, the Government was compelled to seek finances to pay upfront before delivery.

#### **Procurement of EVIDs and resultant failure of Optical Mark Reader (OMR)**

22. The Commission did not factor in compatibility of these devices and the BVR. The selected vendor, Face Technologies had expressed unwillingness to upload the data. This same company was one of those alleged to have been fronted by one faction of the IEBC in the failed internal BVR procurement.

23. The Commission gave Face Technologies the leeway to supply what was not tendered for, by allowing the vendor to change terms mid-way through the procurement, effectively varying the contract from 30,000 hand held devices to 34,600 devices that included handheld devices and laptops. This was a variation on quantity and specifications. Other vendors may have in fact supplied better equipment given a chance.

24. This variation led to an increase of contract sum by USD 4,845,357.00 (about Kshs. 500 million). This was in contravention of

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Procurement Regulation 31(b) because it was above the 10% variation threshold. The Tender Committee did not sit to approve this variation, contrary to Section 47(a) and (b) of the Public Procurement and Disposals Act 2005 that states in part;

*(a) the amendment has been approved in writing by the tender committee of the procuring entity;*

*(b) any contract variations are based on the prescribed price or quantity variations for goods, works and services.*

25. The variation was one of the key causes of failure of the devices. The laptops had no power solution that was relevant to the local polling station scenario. All devices collapsed massively. This was further compounded by lack of enough time for training of key electoral personnel. The contract variation was proposed by the secretariat and sanctioned by the Commissioners.
26. The vendor went further to lodge claims to the Commission to the tune of Kshs.393,443,410.00. The current CEO paid USD 2.5 million (Kshs.258 million) with a further claim of USD 1.9 million still pending. Mr. Chiloba's assertion that he paid without a valid contract because the IEBC had taken ownership of the extra devices and actually used them does not satisfy the Committee which finds this as an irregular payment. Further, the Committee observes that the Sale of Goods Act and the Law of Contract that he subsequently relied on did not supersede the procurement laws in place.
27. The equipment were not inspected by the Inspection and Acceptance Committee as is required under Regulation 17(3) of the Procurement Regulations. The Commission therefore deployed uncertified equipment for the election.
28. Resulting from the above, it is clear payment was un-procedural because the inspection certificate is a pre-requisite document for payment beside the contract documents. The payments were authorized by the then CEO for Kshs. 1,431,997,965.00 and the current CEO for Kshs. 258 million.
29. There was little value for money in the EVIDs procurement. The cost of the 30,000 devices was Kshs.1,431,997,965.00. The gadgets for which these monies were paid for largely failed, even as the Commission faced further payment claims of Kshs.393,443,410.00 from the vendor. The IEBC currently still does not have a power solution to the numerous failed laptops they procured.

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#### **Electronic Results Transmission System**

30. The procurement of ERTS was partly sponsored by the International Foundation for Electoral Systems (IFES). The Committee notes that

the Commission deployed a system they were not proficient in, and relied wholly on consultants; the result was that the system crashed and hence rendered the expenditure on BVR and EVIDs useless.

31. The internet solution from Safaricom and Access Kenya, and connectivity by Airtel at the Commission headquarters and at the National Tallying Centre at Bomas by Airtel were directly procured in contravention of Section 35 of the Public Procurement and Disposals Act, 2005.
32. The ERTS Tender Committee members composed of Ms. Beatrice Sungura-Nyabuto, Mr. Edward Karisa, Mr. Joel Mabonga, Mr. Bilha Kiptugen, Ms. Dinah Liech, Mr. Willie Kamanga and Ms. Dianah Mwacharo, used quotations to procure 5,951 mobile phones at a cost of Kshs.17,847,049.00, in addition to procurement of audio-visual equipment at a cost of Kshs. 5,078,480.00, well above the Kshs.1 million threshold contrary to provisions of the First Schedule of the Public Procurement and Disposal Regulations 2006.

#### **Universal Polling Kits**

33. Delivery of these kits was well after the General Election. This in essence rendered the expenditure of Kshs. 1,587,375,000 un-useful for the General Election purposes, and is another pointer as to the haphazard procurement at IEBC. The contract was however later varied to hand held metal detectors for general use by security agencies since the contract was already signed and could not be cancelled.

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## PART VI

### 6.0 CULPABILITY

The Committee was guided by witness statements, evidence submitted and its observations in the site visits it conducted to assign responsibility and culpability for errors of omission and/or commission. With this, the Committee was alive to Article 226(5) of the Constitution which states that:-

*“If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.”*

Specifically, the Committee notes the powers and functions of the IEBC as spelt out in the Independent Electoral and Boundaries Commission Act, 2011, as well as the responsibilities of the IEBC as spelt out in Article 88 of the Constitution.

The Committee apportioned responsibility of its findings to the following:-

#### 1. MR. AHMED ISAACK HASSAN

Mr. Isaac Hassan, Chairman IEBC, is directly responsible for:-

- i. Involvement in procurement by personally appointing lawyers to act for the Commission in the Presidential petition case at the Supreme Court. See appointment letters for legal counsel as evidenced in annex 4.
- ii. Rendering the CEO unable to effectively perform his functions by vetoing human resource deployment in the Commission. Mr. Hassan nullified the deployment of Mr. Bernard Nyachieo despite the Director Finance and Procurement and the CEO indicating lack of support from the said officer.
- iii. Failure to bring to the attention of the Commission reservations from ICT experts from IFES as to impending malfunction of the EVIDs kits. The warning became a reality on Election Day when the devices failed.
- iv. Jointly failing to heed the Attorney General's advice on the BVR procurement and hence inevitably contravening procurement laws.
- v. Failure to provide leadership in ensuring Commissioners provided policy direction and secretariat allowed to run day to day operations.

## 2. COMMISSIONERS

Commissioners Ahmed Isaack Hassan, Ms. Lilian Bokeye Mahiri-Zaja, Mr. Albert Camus Onyango Bwire, Mr. Mrs. Kule Galma Godana, Amb. Yusuf Nzibo, Eng. Abdullahi Sharawe, Mr. Thomas Letangule, Ms. J. Muthoni Wangai, and Mr. Mohamed Alawi Hussun, are collectively responsible for the following inequities:-

- i. Abdicating their oversight duty by collectively failing to ensure adherence to a procurement plan to guide procurement. This provided the secretariat with the leeway to mismanage the process, leading to delivery of essential gadgets up to a day before the Election Day.
- ii. Failure to conduct staff analysis of the Secretariat inherited from IIEC to ensure competence. This led to the collapse of the whole results transmission process. The Commissioners themselves admitted to being misled by the ICT Director to the very end.
- iii. Allowing the CEO to vary contract for delivery of EVID kits without first looking into the requisite consequences and the law.

## 3. MAJ. (RTD.) JAMES O.H. OSWAGO

On matters finance, responsibility lay with the Accounting Officer as per the Constitution and the Public Finance Management Act, 2012 as well as the IEBC Act, 2011. The Committee found Mr. James O.H. Oswago, culpable in the following manner:-

- i. As the Accounting Officer, he failed to ensure strict adherence to the Public Procurement and Disposal Act, 2005 and Procurement Regulations 2006 16(4), by appointing Ms. Decimah I. M'mayi and Mr. Edward Karisa to the Evaluation Committee and due diligence team to India despite some of the members having served in the Tender Committee. This was contrary to the regulations.
- ii. Failure to perform functions vested in the office of the Accounting Officer as stipulated in Section 10 of the IEBC Act, 2011, leading to inability of the IEBC to procure BVR devices which occasioned a costly loan by the Government of principal Kshs.6,480,000,000.
- iii. Inability to perform functions vested in the office of the Accounting Officer as stipulated in Section 10 of the IEBC Act, 2011, leading to late and hasty procurement of EVID kits. This made it impossible to train personnel and conduct test runs on the kits on time.
- iv. Variation of contract to Ms. Face Technologies for the procurement of an extra 4,600 kits. This was beyond the allowed threshold of 10% as stipulated in Regulation 31 (b) of the Public Procurement and Disposal

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Regulations, 2006.

- v. Negligence in ensuring that EVID kits were inspected and accepted on delivery.
- vi. Payment of Kshs.1,431,997,965.00 to M/s. Face Technologies without due diligence. Procedure demands that an Inspection certificate be among the documents attached for approval of final payment.
- vii. Failure to heed the Director ICT's advice against procurement of EVIDs.

#### 4. MR. WILSON SHOLLEI

His appointment letter specifically places procurement functions under his responsibility. The Committee found Mr. Wilson Shollei culpable of the following acts;

- i. Failure to perform functions stipulated in his appointment letter, which resulted to IEBC to procure BVR devices which led to a costly loan by the Government.
- ii. Inability to perform functions stipulated in his appointment letter, leading to late and hasty procurement of EVID kits. This made it impossible to train personnel and conduct test runs on the kits on time.
- iii. Variation of contract to Ms. Face Technologies for the procurement of an extra 4,600 kits. This was beyond the allowed threshold of 10% as stipulated in Regulations 31(b) of the Procurement Regulations, 2006.
- iv. Failure to ensure that EVIDs kits were inspected and accepted on delivery.

#### 5. MR. EDWARD KARISA

The former Director, Finance and Procurement failed to perform his functions in accordance to the law;

- i. Variation of contract to Ms. Face Technologies for the procurement of an extra 4,600 kits. This was beyond the allowed threshold of 10% as stipulated in Regulations 31(b) of the Public Procurement and Disposal Regulations, 2006.
- ii. Inability to ensure that EVIDs kits were inspected and accepted on delivery to ascertain quality and value for money.
- iii. Processing payment of Kshs. 1,431,997,965.00 for Ms. Face Technologies without due diligence. Procedure demands that an Inspection certificate be among the documents attached for approval of final payment.
- iv. Being part of the due diligence team that travelled to India knowing too well that he had sat in the tender committee, contrary to Regulation

16(4) of the Public Procurement and Disposal Regulations, 2006.

## 6. MR. BERNARD NYACHIEO

The then procurement manager failed to ensure strict compliance to the procurement regulations, as the head of this department. He specifically failed to avail the tender opening register as required by Section 60(6) of the Public Procurement and Disposal Act, 2005.

## 7. TENDER COMMITTEES

- (i) Members of the 2<sup>nd</sup> BVR Tender Committee namely Ms. Immaculate Njenge Kassait, Mr. Joel Mabonga, Mr. Peter Ibrae, Ms. Nancy Kariuki, Mr. Mohamed Jabane, Ms. Dinah Liech, Mr. Bilha Kiptugen and Mr. Bernard Nyachieo, recommended award of tender to Face Technologies that quoted well above budget, contrary to Regulation 31(b) as it went beyond the allowed threshold of 10% as stipulated in the Public Procurement and Disposal Regulations of 2006. The Public Accounts Committee finds suspicion in the Tender Committee's determination to award the contract to Face Technologies.
- (ii) The ERTS Tender Committee members composed of Ms. Beatrice Sungura-Nyabuto, Mr. Edward Karisa, Mr. Joel Mabonga, Mr. Bilha Kiptugen, Ms. Dinah Liech, Mr. Willie Kamanga and Ms. Dianah Mwacharo, used quotations to procure 5,951 mobile phones at a cost of Kshs.17,847,049.00, in addition to procurement of audio-visual equipment at a cost of Kshs. 5,078,480.00, well above the Kshs.1 million threshold contrary to provisions of the First Schedule of the Public Procurement and Disposal Regulations 2006.
- (iii) The ERTS Tender Committee members comprising Mr. Edward Karisa, Mr. Bilha Kiptugen, Ms. Dinah Liech, Mr. Lemiso Godfrey, Mr. Willie Kamanga and Ms. Milcah Chebosis directly procured WAN connectivity from Safaricom Limited at a cost of Kshs.6,132,013.00 in contravention of Section 74 of the Public Procurement and Disposal Act, 2005.
- (iv) The EVIDs Tender Evaluation Committee of Ms. Decimah I. M'mayi, Mr. James Gichuhi, Mr. Steven Ikileng, Mr. Michael Ouma, Mr. Godfrey Lemiso, Mr. Reuben Chirchir, all of IEBC; and Mr. Wilfer Kibii and Mr. Washington Okoth of KEBS; and Mr. Thomas Odhiambo of e-Government was found to have breached Regulation 16(6) of the Procurement Regulations by failing to

~~conduct individual evaluations. It therefore cannot be ascertained that the process was free and fair.~~

#### **8. MR. EZRA SIMIYU CHILOBA**

The current CEO paid a claim of about Kshs.258 million to Face Technologies for the extra claims that arose from the variations. This payment was irregular as it was not supported by a valid contract. The former CEO had indeed declined to effect payments on the claim.

#### **9. THE JOINT TECHNICAL COMMITTEE OVERSEEING GOVERNMENT TO GOVERNMENT PROCUREMENT OF BVR**

The following were members of the Joint Technical Committee that was tasked to validate the provider, as well as advise on the financial implications of the Canadian loan:-

- |                          |   |   |
|--------------------------|---|---|
| i. Mr. Joseph Kinyua     | - | Permanent Secretary, Ministry of Finance, Chairperson |
| ii. Mr. Kennedy Kihara   | - | Office of the President                               |
| iii. Mr. Karoli Omondi   | - | Office of the Prime Minister                          |
| iv. Mr. Dismas Ong'ondi  | - | Director ICT, IEBC                                    |
| v. Mr. Edward Karisa     | - | Director Finance and Procurement, IEBC                |
| vi. Ms. Selestine Otunga | - | Ministry of Finance                                   |
| vii. Mr. John Tuta       | - | Ministry of Justice                                   |
| viii. Ms. Emma Mburu     | - | Ministry of Finance                                   |

They jointly failed to safeguard public funds as follows; -

Failure to fully factor in advice from the Attorney General demanding among others, justification of direct procurement and documentation of incorporation of Safran Morpho, a company registered in France, coming into a deal between the Government of Kenya and the Government of Canada.

This company had in fact bid for the tender and had quoted € 26,989,937.52 (Kshs.4,087,388,095.96) below what was eventually paid to CCC to get the gadgets from them. This was a way of circumventing the competitive procurement process by single sourcing Safran Morpho and paying funds over and above their initial bid.

## PART VII

### 7.0 RECOMMENDATIONS

The Committee recommends as follows:-

THAT:-

1. The Ethics and Anti-Corruption Commission (EACC) should investigate the IEBC Chairman Mr. Isaack Ahmed Hassan, Commissioners Mohamed Alawi Hussun and Thomas Letangule for their apparent involvement in the procurement of the BVR Kits and for their role in exerting undue influence and pressure for the tender to be awarded to Face Technologies and not 4G Identity Solutions. This was in contravention of the IEBC Act, 2011, the Procurement laws and the advisory from the Public Procurement and Oversight Authority, which clearly stipulates that procurement shall be solely a function of the Secretariat of the Commission.
2. The Independent Electoral and Boundaries Commissioners must forthwith desist from operational, technical and administrative functions that are solely vested on the Commission's Secretariat. To avoid functional overlaps, the Commissioners shall restrict their roles to policy, oversight and supervision of the Secretariat only. Daily and routine management, execution and operational functions shall be the work of the Secretariat. The National Assembly should undertake comprehensive review of the Independent Electoral and Boundaries Commission Act, 2011, to ensure that this is achieved through the amendment of the relevant sections of the Act.
3. The Independent Electoral and Boundaries Commission should comprise three members to serve on part time basis as per the provisions of Article 250(5) of the Constitution. The National Assembly should urgently amend section 35 of the Independent Electoral and Boundaries Commission Act, 2011, through its entire deletion, followed by comprehensive amendments to the first and second Schedules of the IEBC Act to bring this recommendation into effect. The process of nominating and appointing the Commissioners should be as participatory and inclusive as possible, taking into account key national interests,

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~~particularly national unity and inclusivity and the involvement of all key stakeholders.~~

4. To ensure a lean and efficient Secretariat, the Independent Electoral and Boundaries Commission Act, 2011 should be amended in sections 10, 11 and 12 to redefine the role of the Commission Secretary, the composition of the Secretariat, the mode of creation and the number of Directorates, field offices, units, divisions or committees within the Commission. Those directorates, field offices, units, divisions or committees with overlapping roles should be merged or scrapped altogether.
5. The Ethics and Anti-Corruption Commission (EACC) should conduct a thorough lifestyle audit on Commissioners Isaack Ahmed Hassan, Mohamed Alawi Hussun and Thomas Letangule and other IEBC Commissioners namely Ms. Lilian Bokeye Mahiri-Zaja, Mr. Albert Camus Onyango Bwire, Mrs. Kule Galma Godana, Amb. Yusuf Nzibo, Eng. Abdullahi Sharawe, and Ms. J. Muthoni Wangai; and all members of the Tender Committees to establish their source of wealth during and after the 2013 procurement of the electronic voters devices.
6. Recovery measures be instituted on the current Chief Executive Officer, Mr. Ezra S. Chiloba for the payment of the extra claims of Kshs.258 million to Face Technologies Ltd. without a valid contract. The Committee further recommends that he be barred from holding public office.
7. The case CR. NO. 141/50/2013 dated 30/10/2013 against Messrs. James O.H. Oswago, Edward Karisa and Wilson Shollei, among others be pursued to completion. Further, fresh charges be brought against them for findings above not already before court.
8. The Joint Technical Committee overseeing the Government to Government procurement of BVR comprising Mr. Joseph Kinyua, Mr. Kennedy Kihara, Mr. Caroli Omondi, Mr. Dismas Ong'ondi, Mr. Edward Karisa, Ms. Selestine Otunga, Mr. John Tuta and Ms. Emma Mburu, be charged for failure to safeguard public funds costing the taxpayer an extra € 36,989,937.52 (Kshs.4,087,388,095.96), and further, failure to implement precautions recommended by the Attorney General against direct procurement of BVR kits. In addition, through omission or commission, they frustrated the offer from the Government of France.

9. The Ethics and Anti-Corruption Commission (EACC) should further investigate the persons named in nos. (i) to (vi) hereunder, for their individual and/or collective roles in the procurement of the electronic voters registration devices for the 2013 General Election. If found culpable, the Director of Public Prosecutions should take appropriate action, including prosecution, against the culprits:-

- (i) Ms. Immaculate Kassait, Mr. Joel Mabonga, Mr. Peter Ibrae, Ms. Nancy Kariuki, Mr. Mohamed Jabane, Ms. Dinah Liech, Mr. Bilha Kiptugen and Mr. Bernard Nyachieo, who were members of the 2<sup>nd</sup> BVR Tender Committee for awarding a tender to Face Technologies Ltd. despite the company having quoted above the budget by Kshs. 825,745,941.00. This was in direct contravention of Regulation 10 (2) (d) of the Public Procurement and Disposal Regulations, 2006.
- (ii) Ms. Decimah I. M'mayi, Mr. James Gichuhi, Mr. Steven Ikileng, Mr. Michael Ouma, Mr. Godfrey Lemiso, Mr. Reuben Chirchir, all of IEBC; and Mr. Wilfer Kibii and Mr. Washington Okoth of KEBS; and Mr. Thomas Odhiambo of e-Government, being members of the Tender Evaluation Committee, for failing to conduct individual evaluations as prescribed in Regulation 16(6) of the Public Procurement and Disposal Regulations of 2006.
- (iii) Ms. Beatrice Sungura-Nyabuto, Mr. Joel Mabonga, Mr. Bilha Kiptugen, Ms. Dinah Liech and Ms. Dianah Mwacharo, being members of the Tender Committee that approved the use of quotations to procure 5,951 mobile phones at Kshs.17,847,049 in direct contravention of the First Schedule of the Public Procurement and Disposal Regulations 2006, which set a maximum exposure of Kshs.1 million.
- (iv) Ms. Beatrice Sungura-Nyabuto, Mr. Bilha Kiptugen, Ms. Dinah Liech, Mr. Hassan Osman and Ms. Dianah Mwacharo, being members of the Tender Committee that approved a quotation to procure audio visual equipment including Projectors at a cost above the Kshs.1 million.

~~prescribed in the First Schedule of the Public Procurement and Disposal Regulations 2006.~~

(v) Mr. Bernard Nyachieo, the then Head of Procurement, for failure to ensure EVIDs kits were duly inspected before deployment; and further, for his failure to keep proper store records on the delivery and supply of OMR scanners and other equipment.

(vi) Mr. Edward Karisa, Mr. Biina Kiptugen, Ms. Dinah Liech, Mr. Lemiso Godfrey, Mr. Willie Kamanga and Ms. Milcah Chebosis, being members of the Tender Committee that approved direct procurement of WAN connectivity from Safaricom Ltd, contrary to Section 74 of the Public Procurement and Disposal Act, 2005.

10. Face Technologies Ltd. should be blacklisted from ever conducting business with the Government of Kenya for its impunity and blatant violation of technical specifications with suspected protection from within or without the Commission. This led to them supplying devices that could not support the election.
11. The Attorney General institutes international recovery measures of Euros 2,676,628.80 (Kshs.305,135,683.20) from Canadian Commercial Corporation paid as 'brokerage' fees.
12. The Attorney General institutes local recovery measures of Kshs: 480,516.00 and interest accruing thereof, from Airtel Kenya for payment for non-existent services.
13. Where Government to Government contracts are undertaken, Treasury must obtain a certificate of clearance from the Attorney General. This will insulate the country from legal pitfalls that may arise. Towards this end, the Attorney General to prepare a legislative framework to guide 'Government to Government' procurement.
14. A thorough and independent technical audit be done immediately of all the electronic equipment held by IEBC to ascertain suitability to conduct present and future elections.

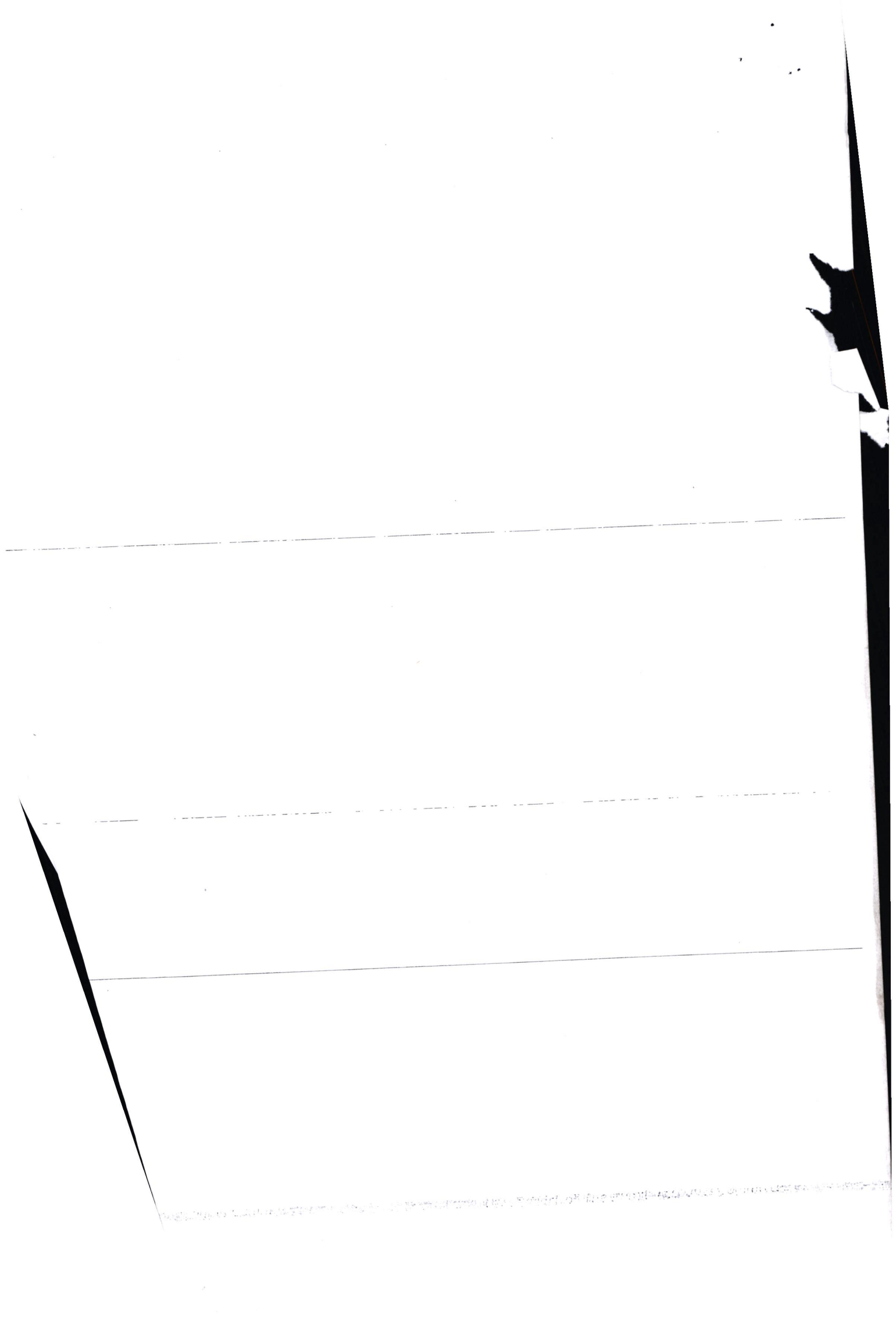
~~The Independent Electoral and Boundaries Commission should always ensure delivery of ICT equipment for use in a General Election at least 12 months before Election Day. The devices~~

must be tested comprehensively and representatives of political parties in Parliament and other stakeholders be invited to witness the test runs.

16. The National Assembly should undertake total and comprehensive review of Parts III and IV of the Elections Act, 2011, to enhance the fidelity and credibility of the General Elections and the confidence of the people of Kenya in the entire electoral system. In particular, the integrity of the voting process must be completely beyond reproach, so as to make the outcome of the elections truly representative of the wishes of the people of Kenya.

17. The Government, in consultation and concurrence of Parliament, should consider secondment of at least one officer each from the Ethics and Anti-Corruption Commission (EACC) and the Office of the Director of Public Prosecutions (DPP), to the Watchdog Committees in the course of undertaking audit reports that concern investigations relating to misuse of Public funds/abuse of office in fulfillment of Article 125 of the Constitution.

18. Since the contract for supply and delivery of the Universal Polling kits is irreversible, the kits (varied to hand held metal detectors) should be immediately supplied as per KEBS conformity standards and deployed for use by the security agencies.



## ANNEXURES

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**List of annexures**

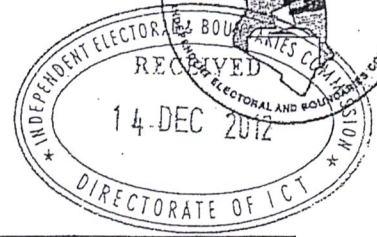
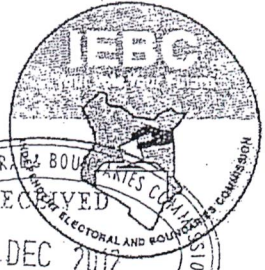
1. Memo from former ICT Director, Dismas Ong'ondi advising against procurement of the EVIDs.
2. Chairman Isaack Hassan's response to expert opinion recommending cancellation of EVID procurement.
3. Minutes showing Commission's approval of variation of EVID kits to be supplied by FACE Technologies.
4. Letter by IEBC Chairman procuring lawyers to act for the Commission.
5. Public Procurement Oversight Authority's recommendation against commissioners' involvement in procurement.

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6. Concept paper by former ICT Director recommending 30,000 laptop solutions.
7. Attorney General's advisory on the GOK and Canadian Commercial Corporation (CCC) agreement on procurement of BVR.
8. Attorney General's letter placing responsibility of the GOK/CCC deal on Treasury.
9. Letter from Treasury urging IEBC to expend appropriated sums on BVR kits.
10. Chairman Isaack Hassan's letter revoking redeployment of Mr. Bernard Nyachieo.

ANNEX 1A

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION



*Div ICT  
W. J. J. J.*

INTERNAL MEMO

TO: DCS-Support Services  
FROM: Director - ICT  
DATE: 6th December, 2012

SUBJECT: TENDER: IEBC 14/2011-2012 SUPPLY, INSTALLATION, CONFIGURATION, TRAINING, TESTING AND COMMISSIONING OF ELECTRONIC VOTER IDENTIFICATION DEVICES.

The above tender refers.

The Directorate of ICT has held consultative meetings with FACE technologies who won the above tender with a view of clarifying a number of technical issues and wish to draw your attention to the following:

- i. Device model proposed by FACE Technologies in the evaluated bid differs from Proof-Of-Concept model which also differs from the model to be supplied.
- ii. FACE technologies proposed that they candeliver the equipment by 9th February, 2013. Considering the strict timelines, this will give the commission very limited time to carry out the necessary configurations, testing and deployment to all the polling stations centres.
- iii. The bidder indicated that they will not be able to provide regional support for the devices to the commission. The commission will have to maintain a central support desk in Nairobi. The commission's experience from BVR demonstrates clear value in providing regional support to the regions, especially for such a complex electoral process.
- iv. The original specifications of the EVID envisaged would have 3G modules for data connectivity. Since FACE Technologies can no longer supply this with the same price, it means that these devices will not have regional support.

*W. J. J. J.*

transmit provisional results and periodic voting progress reports from the polling stations. It therefore means that the Commission will have to invest in parallel technology for the results transmission system.

- v. Face Technology indicated that they will not load VR data onto the devices as this is outside the scope of their TOR'S. Although they have stated that they will provide a mechanism for data upload, it is not clear what type of infrastructure the Commission will be required to provide for this, and who will provide any additional devices required and there will be enough time for the Commission to perform this task internally.

We also add that there are other critical and competing priorities that make the realisation of the EVID project risky. These activities include the Results system and the BVR project. We do not recommend that the simultaneous introduction of so many technologies so close to an election since doing so leaves us with inadequate time to test / pilot and stabilise these new solutions before full use.

#### RECOMMENDATION

Based on the above challenges, the ICT directorate recommends that the Commission:

- i. Considers terminating the EVID tender since no contract has been signed yet;
- ii. Takes a progressive implementation approaching to pilot this solution starting with the reconfiguration of the 15,000 BVR kits for deployment to selected polling stations in each electoral area in March 2013 elections. This will require the BVR supplier add this functionality on the BVR kits.

Forwarded for your consideration.

  
Dismas Ong'ondi

e.c. CEO

→ is this viable path? cant last  
day.

**Tender no IEBC/14/2011-2012: Supply, Delivery, Installation,  
Configuration, Training, Testing and Commissioning of  
Electronic Voter Identification Devices**

**1. Introduction**

FACE Technology is proposing an alternative, laptop computer-based EVID solution with additional batteries and an external fingerprint reader. This proposal differs from the fully integrated handheld device in the subject contract awarded to FACE Technology.

At their request to the Commission, FACE Technology was granted an opportunity to demonstrate their laptop-based solution on Tuesday, 22 January 2013. Below are our observations and recommendations from the technical presentation (Legal and contractual issues are outside the scope of this paper).

**2. Operating Platforms**

In the new proposal, the application software does not deviate from the original proposal that was evaluated, however, the hardware has been from an integrated handheld device to a laptop-based solution with an external fingerprint reader.

**3. Power Management**

The power management of the proposed solution may not be adequate in remote/rural areas without electricity. To mitigate this the vendor is supplying three batteries per laptop. Swapping batteries during voting hours requires that the equipment is switched off temporarily since the batteries are not hot swappable. This is disruptive and can be the cause of undesirable public suspicion on Election Day.

In addition, should the three supplied on-board batteries drain due to un-anticipated extended voting, there will be no facility to recharge them while voting proceeds in places without mains power supply. Even where mains power supply exists, the batteries in their present configuration, will have to be installed to be charged.

**4. Portability**

The laptop and its batteries are not as portable as the fully integrated handheld device, which is proposed and therefore will present complications in Election Day logistics. The fingerprint scanner comes separately from the laptop.

**5. Lack of uniformity in solution**

The vendor proposes to supply 5,000 units of the hand-held pollbooks and 25,000 units of the laptop solution. This may present a credibility issue for the commission in public. The Commission would be willing to deploy different platforms in different elections.

**6. Warranty Issues**

The proposed, un-branded laptop will not benefit from manufacturer's end user warranty locally since there is no known established warranty service provider. The requirement to ship back to source (China) through FACE will cause service delays or interruptions. It is not clear how many warranty stocks FACE will supply and how this quantity is arrived at to ensure adequate coverage during and after elections. We find this proposal risky and therefore unacceptable.

#### 6. Risk of Delay and/or Non-Performance

The delays already experienced in this project have made it very difficult for the Commission's ICT team to prepare for the implementation of this key project a timely manner. This is made worse by the fact that the supplier is unwilling to deliver a fully configured, read-to-use solution with data uploaded. This is likely to affect the success of the project.

From the onset, the vendor was not committal in their involvement in data upload to the electronic poll books. With the limited time to the General Elections, this will present a logistical and operational challenge to upload the 30,000 devices with the polling station registers.

In addition, unless penalties for delays or non-performance are specifically stated in the contract, the risk of delays and/or failure to perform according to expectations remains high.

#### 7. Way-forward

##### Scenario 1: Cancel the EVID contract

In this scenario, the Commission cancels the FACE Technologies contract on the grounds of non-performance. The Commission proceeds with the use of a photographic Voter List on March 4<sup>th</sup>, based on a de-duplicated voter registration database that is also free of deceased citizens following the fresh BVR exercise in late 2012. The high quality of the voter list can offset stakeholder concerns.

Pros	Cons
<ul style="list-style-type: none"> <li>Clarity and the elimination of uncertainty</li> <li>Eliminates the risk of a failure to implement EVID fully or properly due to late delivery, training, deployment</li> <li>Easier management of reputational impact - now, versus late February</li> </ul>	<ul style="list-style-type: none"> <li>Contractual implications, possible litigation</li> <li>Reputational impact</li> </ul>

##### Scenario 2: Proceed with FACE Technology's alternative solution

FACE Technology is proposing an alternative, laptop computer-based EVID solution with additional batteries and an external fingerprint reader. This product can be delivered on a new schedule and is intended be used instead of the mobile handheld device FACE last offered.

Pros	Cons
<ul style="list-style-type: none"> <li>Reputation of Commission not damaged in the short term</li> <li>Completed procurement</li> </ul>	<ul style="list-style-type: none"> <li>Risk of failure to deliver remains high, with implications for EVID implementation on March 4<sup>th</sup></li> <li>Logistics challenges - added weight, more batteries, charging</li> <li>Less integrated product, more difficult to train and support</li> </ul>

**Scenario 3: BVR Laptops used as EVID**

The Commission cancels the FACE Technology contract and instead modifies the BVR kits to act as EVID. This requires software and configuration with the appropriate data.

Pros	Cons
<ul style="list-style-type: none"> <li>• Solution can be developed quickly</li> <li>• Hardware on hand and familiar to Commission and field staff</li> <li>• Possible collaboration with BVR Kit vendor to maximise data transfer to kits for EVID purpose</li> <li>• Large capacity of BVR kit hard disks mean fewer database segments, more rapid deployment.</li> <li>• Easier management of reputational impact now - versus late February.</li> </ul>	<ul style="list-style-type: none"> <li>• Insufficient Kits to cover every polling station. Deployment possible in every Ward, but not every Station.</li> <li>• Risks of failure associated with very tight development, test, training and deployment timeline.</li> <li>• Heavy kits adds to election day logistical challenges</li> <li>• Contractual implications, possible litigation</li> <li>• Reputational impact</li> </ul>

**Scenario 4: Borrow EVID devices from another country**

The Elections Commission of Ghana recently procured a similar number of EVID as required by the Commission. It may be possible to borrow these devices, and reconfigure and deploy for use in Kenya. This scenario presumes that the Commission cancels the FACE Technologies contract.

Pros	Cons
<ul style="list-style-type: none"> <li>• EVID used as per Commissions strategy</li> <li>• Cost savings</li> </ul>	<ul style="list-style-type: none"> <li>• Feasibility (political, technical, financial, timeline) to be determined</li> <li>• Risk of failure is real</li> <li>• Ghana's problems with their EVID may undermine Kenyan stakeholder confidence in Ghanaian solution</li> <li>• Significant logistics problems</li> </ul>

**Scenario 5: Alternative Procurement – 2<sup>nd</sup> Vendor**

The Commission cancels the FACE Technologies contract for non performance. The determines whether the second technically qualified vendor in the EVID procurement delivering in the available time. If so, Commission contracts this vendor and proceeds w

Pros	Cons
<ul style="list-style-type: none"> <li>• EVID used as per Commissions strategy</li> </ul>	<ul style="list-style-type: none"> <li>• Delivery timelines are alm</li> <li>• Contractual arrangement</li> <li>• Risk of failure remains</li> <li>• Cost implications a premium for shorte</li> </ul>

**Conclusion and Recommendation**

None of the scenarios is without risk, but Scenario 1 offers the mos

events in Ghana have shown, problems with voter identification, even if this is not a prerequisite for voting, can have impact on Election Day. The Commission has, despite the late start, held a successful voter registration exercise and the resulting lists are free of duplicates and contain no deceased voters. The accuracy of this data, coupled with printing the photograph of each voter on the final list offers significant improvements over any previous voter lists. Therefore the Commission can confidently assert that, despite the cancellation of the FACE Technology contract due to non-performance, the March 4<sup>th</sup> elections will have high integrity.

## 8. Conclusion

Taking all factors into consideration, especially the short time left to elections, the delayed completion of the BVR process, which affects data preparation for the EVID, the ICT directorate considers the risk of failure of the EVID project significantly high. For this reason, we have no choice but to recommend Scenario 1 above, to cancel the project due to time constraints and doubts about supplier performance and/or reliability.

If the Commission decides to ignore the risk of failure and proceed to implementation, then we recommend to explore the possibility of borrowing devices from Ghana or accept a significantly reduced quantity of FACE's latest proposed laptop-based solution taking into account the existing 16,500 BVR/EVR laptops which can be re-configured for authentication and 1,400 EVR single fingerprint readers, provide FACE undertakes to maintain and support the new and existing kits.

---- END ----

ANNEX 2

From: ahmedissack786 [mailto:ahmedissack786@yahoo.com]  
Sent: Friday, December 7, 2012 7:23 PM  
To: WShollei@IEBC.ORG.KE; ojhoswago@yahoo.com; dongondi@IEBC.ORG.KE  
Cc: EKarisa@IEBC.ORG.KE; PTororey@IEBC.ORG.KE; wilson.shollei@yahoo.com; IKassait@IEBC.ORG.KE;  
Moses Owuor; Genet Menelik; Mike Yard; Ronan McDermott  
Subject: Re: Electronic Voter Identification Device - draft contract?

Ronan with tremendous respect your recommendation coming so late in the day is most unfortunate and unacceptable. We need to separate results transmission from the pollbook. Another tender cancellation will seriously undermine the dwindling confidence levels in the commission. I am sorry I have not met you formally but permit Me to tell your advise is bad advise. Help us salvage the situation by making sure the device does what it's doing in Ghana which is just to I'd the voter. Regards

Sent from Samsung Mobile

Wilson Shollei <WShollei@IEBC.ORG.KE> wrote:

This is a very worry development coming very late in the day. A few minutes, I received a copy of a memo from Dismas from the CEO on the same matter.

We have all along operated on the understanding that device was compatible and having passed through the evaluation, there appeared to have been no problem. This I believe is why it was awarded.

A meeting is obviously necessary to better understand the issues. May is suggest we meet today at 2.30 pm today so that we can make an appropriate decision on the matter.

Cancellation is obviously a weighty matter that requires very careful consideration. There are pertinent issues that must be answered. What was the purpose of the tender?, Did the evaluation reveal the gaps? Has the supplier indicated that he would not make good technical gaps or any defects?

As I understand, the issue is in IEBC concluding the matters of contract to enable the deliver and meet all our needs. This I believe is what are working towards. We have significantly progressed all other administrative matters on this procurement.

An urgent meeting is an imperative.

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From: Ronan McDermott <RMcDermott@ifes.org>  
Date: Friday, December 7, 2012 11:19 AM  
To: James Oswago <oijoswago@yahoo.com>, "ahmedissack786@yahoo.com" <ahmedissack786@yahoo.com>, Mike Yard <myard@ifes.org>  
Cc: IEBC <wshollei@iebc.or.ke>, Dismas Ong'ondi <dongondi@IEBC.OR.KE>, Edward Karisa <EKarisa@IEBC.OR.KE>, Praxedes Tororey <PTororey@IEBC.OR.KE>, W Shollei <wilson.shollei@yahoo.com>, Immaculate Kassait <IKassait@IEBC.OR.KE>, Moses Owuor <mowuor@ifes.org>, Genet Menelik <gmenelik@ifes.org>  
Subject: RE: Electronic Voter Identification Device - draft contract?

Hello,

Please find attached my briefing paper on the EVID procurement. IFES recommends that the Commission cancel the procurement of EVID for the following reasons:

### Summary of Justifications for Cancelling EVID Procurement

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1. The device is too far removed from the IEBC Tender Document requirements and will either be obsolete immediately after the election or require expensive retrofit to bring it up to required specification.
2. The delivery schedule is ambitious and lacks credibility. FACE Technology themselves have repeatedly expressed concerns about their ability to deliver given the delays in contracting. Had such concerns been raised during due diligence – they might well have been reasonable grounds for disqualification. On-time delivery remains a significant risk factor.
3. The bidder will not meet the Tender Document requirement that they upload the BVR and VR data onto the device, leaving this enormous task instead to IEBC which is not prepared for this activity.
4. The priority for IEBC must be Results Management - given the centrality of this system to the electoral crisis in 2007, EVID presents a threat to IEBC's plans for results transmission by diverting resources from this project – the impacts are already visible in the delay in procurement of Results Transmission System. Cancelling EVID would allow the IEBC to focus on Results Management.

IFES offers the following Contingency Scenarios:

#### Contingency Scenario 1 – Partial EVID using existing BVR hardware

The Commission makes the necessary software modifications to its existing 15,000 (plus legacy) BVR Kits so that they can be used as EVID on Election Day. Not all polling stations will have EVID, but the available devices can be deployed nationwide with each of the 1,450 county assembly wards having at least one (or two or three – as decided by the Commission) EVID. Their use will add to the integrity of the election process. Those polling stations that do not have EVID deployed will use voter lists that contain the photograph of the voter that will be matched against the voter's National ID card or passport photograph. With proper management, supervision and enhanced oversight by the Commission as well as party agents, domestic and international observers, even a partial deployment of EVID can enjoy the same level of confidence. This Scenario will be cost effective and will enhance the value and utility of the Commission's investment in BVR Kits.

## Contingency Scenario 2 – Photographic Voter Lists

IEBC focuses on the use of technology for results transmission and uses paper Voter Lists on Election Day. These lists have a successful track record in Kenya as well as many countries around the world – the ease of identification of a voter and the difficulty in voter personation make the Photo Voter's List a highly plausible contingency where there are no EVID devices in use.

The attached document elaborates.

Sincerely,

Ronan

--

Ronan McDermott  
ICT Consultant - IFES Kenya  
[rmcdermott@ifes.org](mailto:rmcdermott@ifes.org)  
[ronan@mcdis.com](mailto:ronan@mcdis.com)  
Ireland: +353 86 242 5457

Kenya: +254 773 40 41 51

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**From:** James Oswago [[ojhoswago@yahoo.com](mailto:ojhoswago@yahoo.com)]

**Sent:** 06 December 2012 07:16

**To:** W Shollei

**Cc:** Ronan McDermott; [wshollei@iebc.or.ke](mailto:wshollei@iebc.or.ke); [dongondi@IEBC.OR.KE](mailto:dongondi@IEBC.OR.KE); Edward Karisa; Praxedes Tororey

**Subject:** Re: Electronic Voter Identification Device - draft contract?

Dismas

May I know Ronans observation and your own report. Ronan says Face Tech presentation has evolved since POC. What does this mean.

Bw Shollei I told you that this is taking too long. There was a meeting yesterday to review tech matters to do with this gadget. Could I know if all is well Mr Dismas?

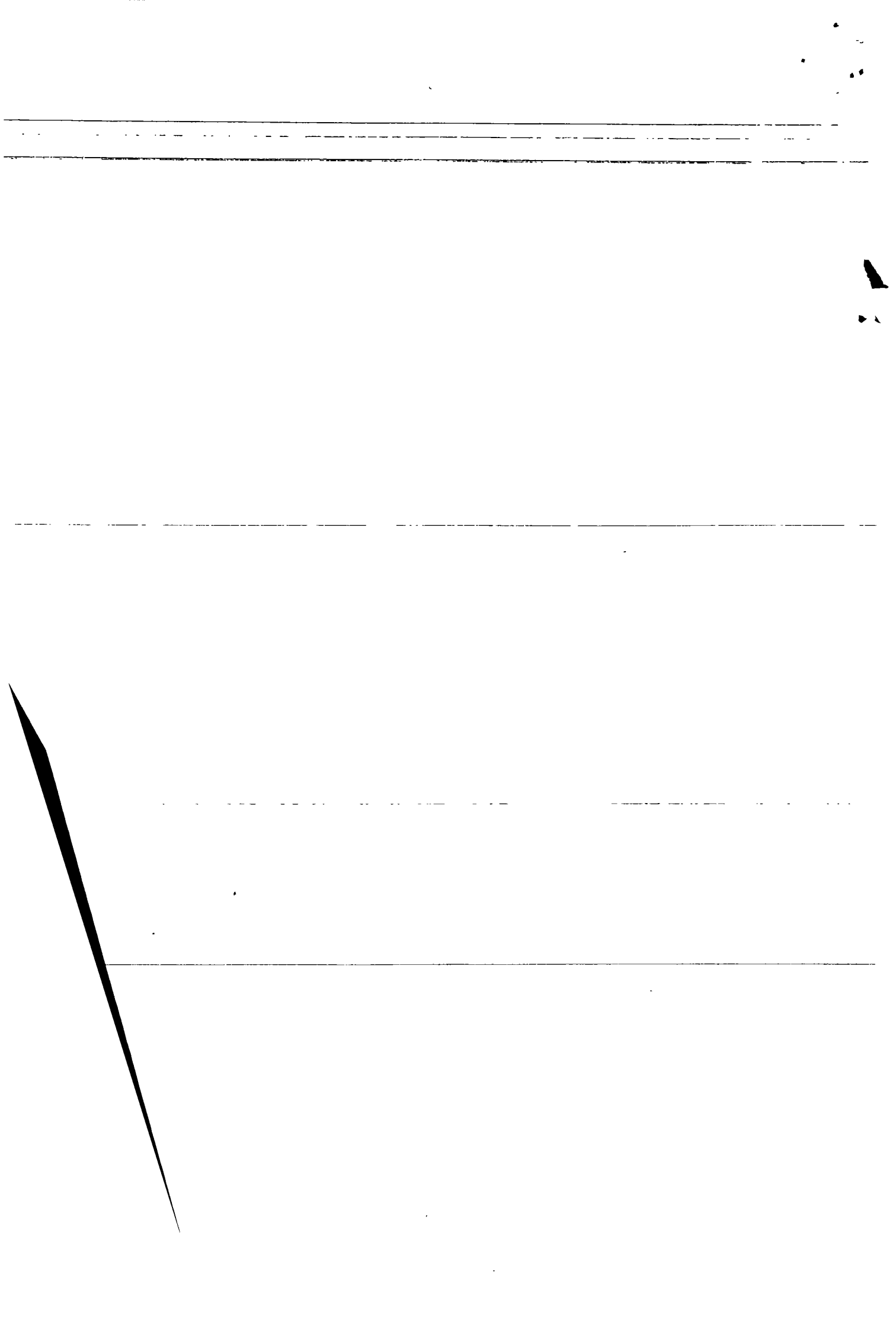
Sent from my iPhone

On Dec 5, 2012, at 10:29 PM, W Shollei <[wilson.shollei@yahoo.com](mailto:wilson.shollei@yahoo.com)> wrote:

We haven't signed the contract. Let us have a discussion tomorrow on the issues that you haven't interrogated as my role has been largely confined to dispensing on procedural

I would like to be appraised fully

Sent from my iPad



**MINUTES OF 42<sup>nd</sup> PLENARY MEETING OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION, HELD AT ANNIVERSARY TOWERS 6<sup>TH</sup> FLOOR COMMISSION BOARDROOM, ON 26<sup>TH</sup> JANUARY, 2013 AT 10.00 AM.**

**PRESENT**

- |    |                           |                         |
|----|---------------------------|-------------------------|
| 1. | Mr. Ahmed Issack Hassan   | Chairperson             |
| 2. | Ms. Lilian Mahiri-Zaja    | Vice Chairperson        |
| 3. | Mr. Albert C. O. Bwire    | Commissioner            |
| 4. | Eng. Abdullahi M. Sharawe | Commissioner            |
| 5. | Ms. Muthoni Wangai        | Commissioner            |
| 6. | Mr. O.J.H Oswago          | Commission Secretary/CS |

**APOLOGIES**

- |    |                        |                  |
|----|------------------------|------------------|
| 1. | Ms. Kule G. Galma      | Commissioner     |
| 2. | Amb. (Dr.) Yusuf Nzibo | Commissioner     |
| 3. | Mr. Mohamed Alawi      | Commissioner     |
| 4. | Mr. Thomas Letangule   | Commissioner     |
| 5. | Ms. Beatrice Sungura   | DCS – Operations |

**In Attendance**

- |    |                    |
|----|--------------------|
| 1. | Mr. Wilson Shollei |
| 2. | Dismas Ong'ondi    |
| 3. | Silas K. Njeru     |
| 4. | Stephen Ngeno      |
| 5. | Michael Ouma       |

**Secretariat**

- |                           |
|---------------------------|
| DCS – SS – Taking Minutes |
| Director ICT              |
| ICT Officer               |
| ICT Manager               |
| ICT Manager               |

**AGENDA**

1. Procurement of Poll Books
2. Brief on Preparation of Voters Register
3. Approval of symbols for Independent Candidates
4. Any Other Business

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**MIN. 29/1/2013: Prayers, Apology and Adoption of Agenda**

29.1 The meeting was called to order at 10.50 am after prayers by Dismas Ong'ondi.

29.2 The agenda as amended as adopted.

**MIN. 30/1/2013: Procurement of Poll Books**

30.1 Plenary noted the report prepared by the Secretariat regarding the inability of the Face Technologies (Pty) of South Africa to fulfill the terms of contract on IEBC/14/2011-2012 for the Supply, Delivery, Installations, Configuration, Training, Testing and Commissioning of the Voter Identification Devices.

30.2 Members approved the request from the Secretariat for the Commission to accept the new offer by Face Technologies to supply the Lap-Top based Voter Identification Devices instead of the hand-held Devices provided that it is done within the obtaining law. Consequently the commission will be ordering a total of 34,000 devices 5000-10000 being hand-held devices and the balances Lap-Top based devices.

**IN. 31/1/2013: Brief on Status of the Preparation of the Voters Register**

31.1 The Members were briefed on the status. They noted the progress made and advised that more effort be put to have the register in place by 4th February 2012.

Members considered various issues on how corrections to the Voters Registers should be made. They noted the need to have adequate control measures against unauthorized changes and more particularly need to ensure that the data is safe and secure. In this regard, the Director of ICT was tasked to prepare a report on the safety status of the data for consideration in the next Plenary Meeting.

Director of ICT was further instructed to submit timeliness on the timing uploading of data and completions of corrections to the members.

Members instructed that a report be prepared on the changes to the registration centers though the analysis of the gazette centers and those to be used eventually to register voters.

31.5 Plenary considered the question of what to do with voters in the Green Book but are the Voters Principal register and the need not to disenfranchise registered voters. The meeting directed that a separate exception register be prepared and voters in this register be allowed to vote. In cases where a voter's biometrics are missing, the voter should be notified appropriately and requested to re-register in a constituency office or a ward if convenient to the Commission.

31.6 Members noted the need to re-issue instructions to the various returning officers regarding the procedures to be followed in the nominations and the execution of the code of conduct to ensure that they remained well informed, disciplined and impartial.

31.7 The issue of County Returning Officer (CRO) for Nakuru County was discussed and it was agreed that given the dynamic and complex nature of relations of the residents of the county, that someone more mature, competent and reliable should be made the CRO.

31.8 The meeting directed that a list of County and Constituency tallying centers and nomination centers for be published before the nomination dates to ensure that all are informed accordingly.

**MIN. 32/1/2013: Approval of symbols for Independent Candidates**

3 symbols for independent candidates were approved with amendments.

**IN. 33/1/2013: ANY OTHER BUSINESS**

there being no other business the meeting adjourned at 4:00 P.M

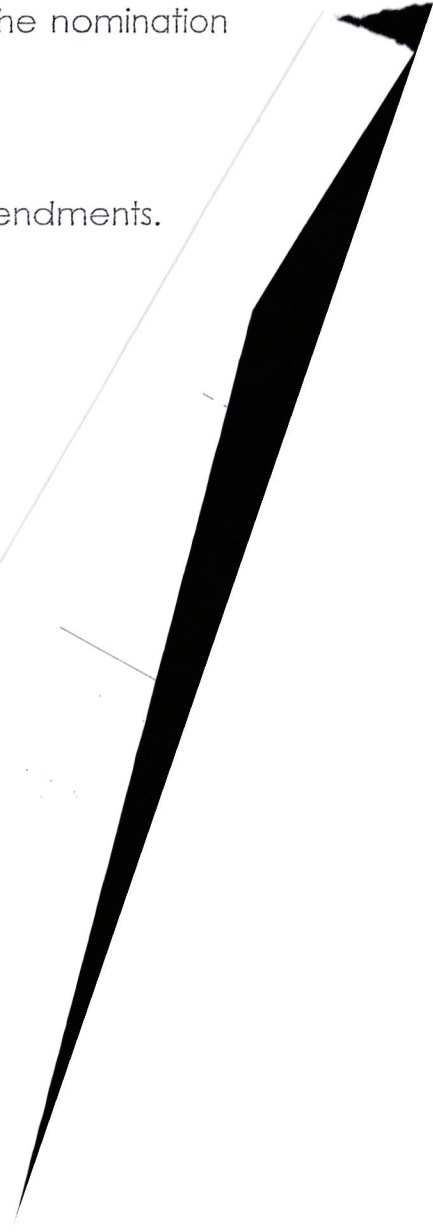
SIGNED BY:

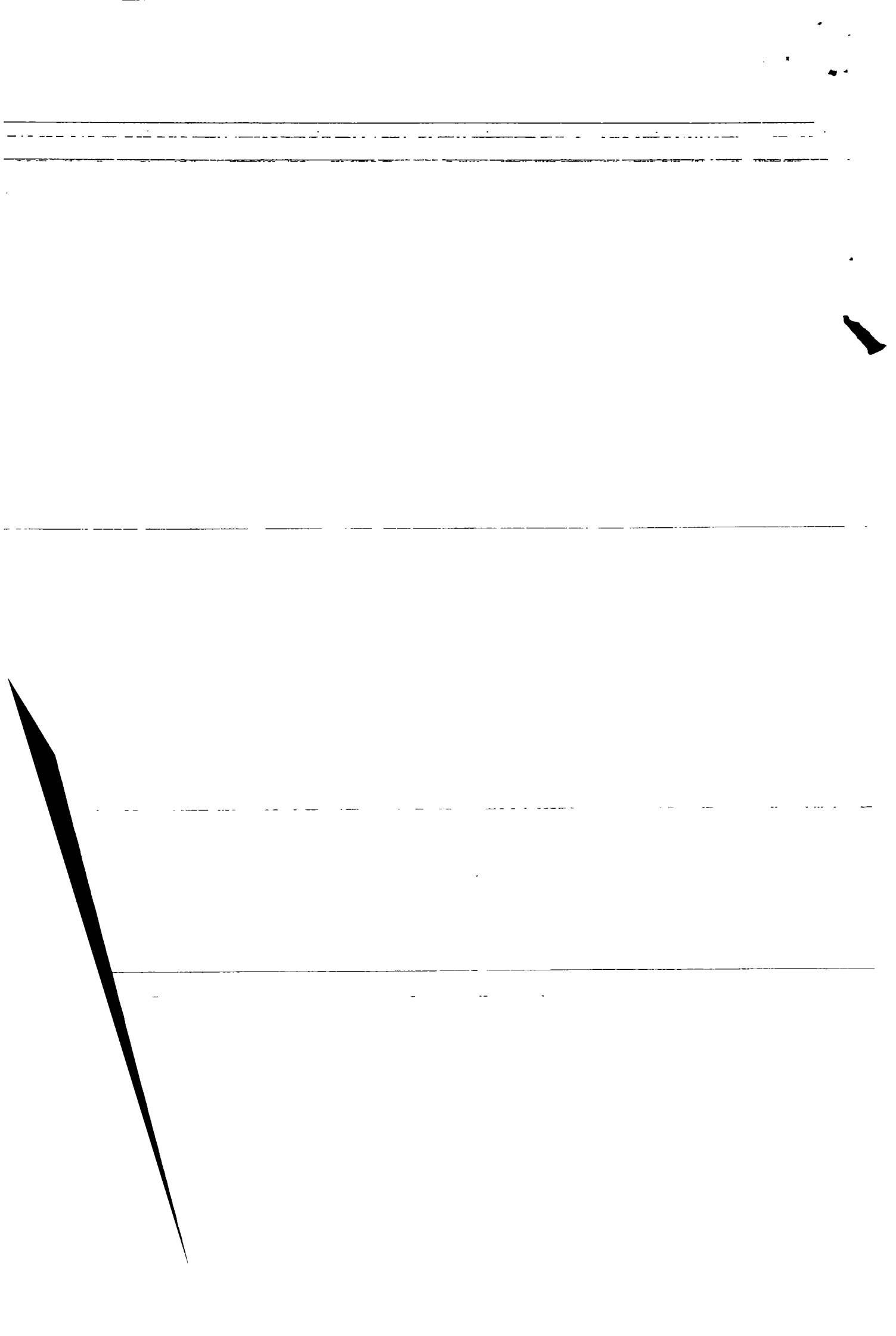
COMMISSION SECRETARY/CEO: ..... D/

O. J. H. OSWAGO

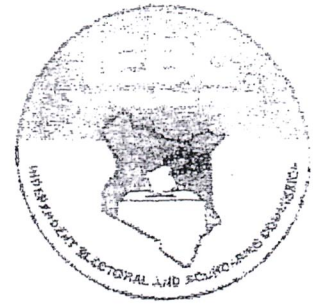
WITNESS/PERSON:.....

AHMED ISSACK HASSAN, EBS





ANNEX 4



Our Ref: IEBC/SCP/3,4&5/2013

18<sup>th</sup> March, 2013

**Ahmednasir, Abdikadir & Co. Advocates**  
CBA Building, Standard Street, 2<sup>nd</sup> Floor  
P.O. Box 57731 - 00200  
**NAIROBI**

Dear *Sir*

**RE: SUPREME COURT PETITION NO. 3 OF 2013  
SUPREME COURT PETITION NO. 4 OF 2013  
SUPREME COURT PETITION NO. 5 OF 2013**

Arising from the presidential election that took place on the 4<sup>th</sup> March 2013 the above mentioned Petitions have been filed in the Supreme Court challenging the validity of the said election. The Commission is a Respondent in both Petitions which were served to the Commission on 16<sup>th</sup> March 2013 and 18<sup>th</sup> March 2013 respectively.

There is need to put up a robust defence against the said Petitions. The Commission hereby instructs you to act on its behalf in the abovementioned Petitions for the Respondent. You will work as part of a team of Advocates that has been constituted by the Commission. We enclose copies of the abovementioned Petitions.

The Commission shall avail to you all documents relating to the presidential election that you may require. Kindly also let the Commission know if you require any members of staff who were involved in the presidential election. We have also forward to you the Principal Register of Voters and the Statutory Form

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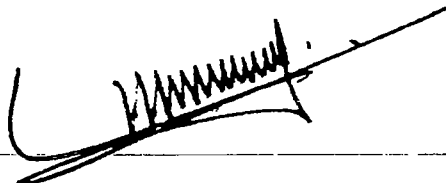
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Kindly but urgently let us have your formal acceptance of these instructions and the terms therein. A deposit will be paid on account.

Please do keep the Commission informed of all progress herein.

Yours *sincerely*

---



AHMED ISSACK HASSAN, EBS  
CHAIRPERSON

ANNEX 5 17/e



**PUBLIC PROCUREMENT OVERSIGHT AUTHORITY**

*Transforming Procurement*

National Bank Building  
Telephone No. +254 (020)3244000, 2213106/7  
Fax: +254 (020) 2213105, 3244377, 3244277  
e-mail: [info@ppoa.go.ke](mailto:info@ppoa.go.ke)  
website : [www.ppoa.go.ke](http://www.ppoa.go.ke)  
When replying please quote:

National Bank Building, 10<sup>th</sup> Floor  
Harambee Avenue  
P.O. Box 58535 - 00200  
NAIROBI  
KENYA

**Ref. PPOA. 6/10 Vol. IV (51)**

**24<sup>th</sup> May 2010**

The Secretary/Chief Executive Officer  
Interim Independent Electoral Commission  
P.O Box 45371 - 00100  
**NAIROBI**  
Anniversary Towers, 6<sup>th</sup> Floor



**RE: PROCUREMENT PROCESS**

Your letter reference no. IIEC/PROC/14(36) of 12<sup>th</sup> May 2010 on the above captioned subject refers.

We have noted your request for guidance on the procurement process. The purpose of the Public Procurement and Disposal Act, 2005 is laid out in Sec. 2 of the Act and includes to maximize economy and efficiency; to promote competition and ensure that competitors are treated fairly; to promote integrity and fairness; to increase transparency and accountability; to increase public confidence; and to facilitate the promotion of local industry and economic development.

Further, Part III of the Act outlines the institutional arrangement procedures that a public entity should put in place to ensure that its decisions relating to procurement are made in a systematic and structured manner. This includes establishment of a tender committee, procurement unit and other bodies required under the procurement law as per Sec. 7. The Second Schedule of the Regulations provides the composition of tender committee's for the various types of public procuring entities.

On evaluation, Sec. 66 of the Act and Reg. 16 further provide methodology to determine the successful tender, composition of the evaluation committee. From the foregoing, the technical committee should forward its report to the procurement unit

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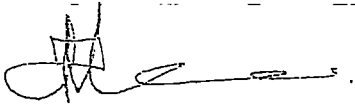
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then prepare the agenda for the tender committee. Reg. 10 goes on to elaborate the responsibilities of the tender committee.

Therefore, it is clear that the procurement unit manages the procurement process. The set forth procurement process flow is, tender opening, tender evaluation including preparation of report(s) and tender adjudication. The committees that preside over the aforesaid stages are tender opening, tender evaluation committee and the tender committee. No other committee is recognized in the procurement law to preside over any procurement stage in between.

Your attention is drawn to Sec. 44(1)(c) and (d) of the Act which provides that the tender evaluation process and documents concerned with it are to be confidential. Also Sec. 38(1) (c) prohibits persons that are not officially involved in the tender evaluation process from attempting to influence the results. Our view is that the Procurement Act and the Regulations do not recognize members of the Finance and Administration Committee of the Commission in the tender process as their involvement would be deemed as a breach of Sections. 38 and 44 of the Act.

Taking cognizance of the foregoing, you are advised to adhere to all the provisions of the Public Procurement and Disposal Law as you proceed in your procurement and disposal undertaking.



**J. W. Njoroge (Mrs)**  
**Ag. INTERIM DIRECTOR GENERAL**

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## **PLENARY PAPER ON IMPLEMENTATION OF ELECTRONIC VOTER IDENTIFICATION DEVICES**

### **1. INTRODUCTION**

This paper presents to the Commission's plenary, for a decision, options and implications of implementing the above project in the March 2013 general elections.

### **2. BACKGROUND**

The Commission awarded *Tender No IEBC/14/2011-2012: Supply, Delivery, Installation, Configuration, Training, Testing and Commissioning of Electronic Voter Identification Devices* to Face Technologies (Pty) of South Africa.

The solution proposed by Face Technology has evolved over time from a tablet-based solution initially to handheld devices presented during the Proof-Of-Concept, and most recently (since 16 January, 2013) to a mix of handheld devices and laptops. Although this evolution presents several technical, operational and contractual challenges that raise the possibility of cancelling the contract, the Commission has repeatedly promised the country that it will integrate appropriate technology in the electoral process to address some of the malpractices witnessed in past elections. Therefore, the decision the Commission reaches must carefully balance the risk of a potential public backlash leading to a possible loss of public confidence if the project is abandoned now, against the risk of a well intended but risky implementation constrained by strict legal election timelines.

Below are the pros and cons of likely scenarios, both which assume a full scale, rather than pilot, implementation.

### **3. IMPLEMENTATION SCENARIOS**

#### **Scenario I: Proceed with Face Technology's Laptop Solution**

The alternative laptop-based EVID solution can function as required on Election Day to identify and authenticate voters at the polls. However, it is the

~~successful operationalization of the technology – delivery, training, data preparation/conversion and migration, device configuration, battery charging, deployment and support – that will determine whether or not the use of the laptop-based solution will be a success or failure.~~

Face Technology has stated that they will provide a mechanism to, but will not be responsible for, uploading the biometric voter registers onto the EVID platform. This fails to address the requirements in Section 1.9 (i) of the Technical Requirements (Support Service Plan) and the Bidders Responsibility on P32 of the tender document. This is a key risk, and the Commission may not have adequate capacity or infrastructure to undertake this critical task within the limited time available.

The proposed laptop solution in its present form does not meet the transportation and power requirements in section 1.5 of the Technical Requirements in the tender document.

#### **Recommendations**

- i. Face Technology supplies the laptop-based EVID solution in a stackable, protective, corrosion-free IP67-compliant (water and dust-resistant) carrying case. Without this, significant breakages could occur during transportation and warehousing of the laptops.
- ii. Replace the three spare on-board laptop batteries with two external lithium iron phosphate (LiFePO<sub>4</sub>) batteries and charging system.
- iii. Face Technology provides the services envisaged in section 1.9 (i) and the Bidders Responsibility as stated in the Technical Requirements of the tender document.
- iv. In the absence of an authorized local manufacturer's warranty service center for the proposed laptops, Face delivers a significant number of replacement stocks and spares.

The above issues were forwarded to Face Technology and their response to each issue are as per attached email, Ref: Contract for Supply of EVID – Tender No. IEBC/14/2011-2012 dated 26 January 2013.

In our opinion, whereas the supplier states a willingness to investigate the possibility of addressing the above concerns, it is clear that no time exists for further investigations and negotiation. This therefore means the Commission must decide based on the prevailing circumstances.

#### **Scenario II: Mix of Existing BVR/EVR Kits and New laptop-based EVID**

Under this scenario, the Commission reviews the contract with Face to reduce the order quantities by the amount of existing BVR/EVR kits, and Face Technology is contracted to supply the EVID software and support for both the existing and new kits.

In this case, a uniform solution is deployed countrywide, for better Election Day management and support.

**As per response No. 3 (see Face Tech's attached email), it is clear that this option is not viable since the supplier is unable to comply within the available. This is therefore no longer an option worth pursuing at this point.**

#### **4. CONCLUSION**

Considering all the circumstances above, it appears that the only option available to the Commission is to accept Face Technology's latest proposal of 5,000 handheld devices and 25,000 laptop-based solution.

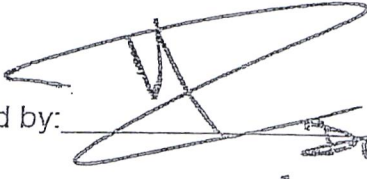
#### **5. REQUEST TO PLENARY**

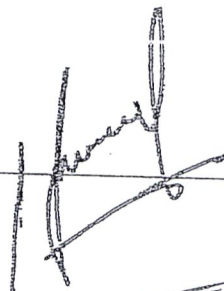
The Commission is requested to:

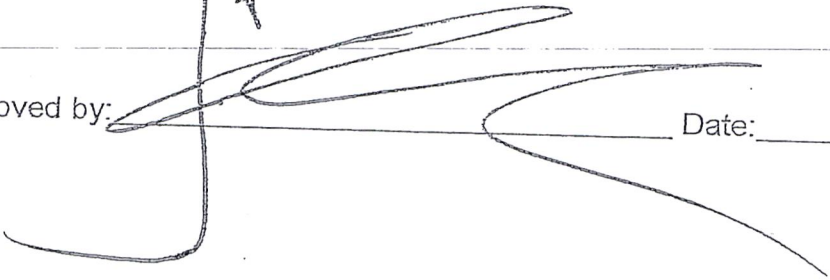
- i. Note that the only feasible option to deliver the solution under the circumstances is as detailed in option 1.

January 26, 2013

ii. Consider and if deemed fit advise the Secretariat to proceed with the only available feasible option. Should this option not be favorably considered, then the Commission cancels the contract and reverts to the printed BVR register.

Prepared by:  Date: 26/01/2013

Reviewed by:  Date: 25/1/13

Approved by:  Date: \_\_\_\_\_

CONFIDENTIAL

ANNEX



THE STATE LAW OFFICE  
OFFICE OF THE ATTORNEY-GENERAL

18<sup>th</sup> September 2012

Your Ref: \_\_\_\_\_

Date: \_\_\_\_\_

Our Ref: AG/CONF/21/54/1 VOL I

Mr. Joseph Kinyua, CBS  
Permanent Secretary,  
Ministry of Finance  
NAIROBI



Mr. Ahmed Issack Hassan  
Chairman  
Independent Electoral & Boundaries Commission  
NAIROBI

Dear \_\_\_\_\_

AGREEMENT FOR THE SALE AND PURCHASE OF HARDWARE AND LICENCE OF SOFTWARE FOR A BIOMETRIC VOTER REGISTRATION SYSTEM BETWEEN THE IEBC AND CANADIAN COMMERCIAL CORPORATION

Reference is made to the ongoing negotiations between the Government of Kenya (represented by the IEBC and the Ministry of Finance), and the Government of Canada (represented by the Canadian Commercial Corporation), and to the draft agreement cited above.

Reference is further made to a letter dated 14<sup>th</sup> September 2012, signed by the Permanent Secretary Ministry of Finance, being a Letter of Commitment to CCC, stating the IEBC has selected the CCC and Morpho Canada as the

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“successful provider” of the BVRS on the basis of their technical proposal, and expressing Government’s commitment to pay the “selected” supplier €56,209,186.68 in that behalf, and further undertaking to sign with CCC a sales contract based on an earlier draft sales contract developed by the supplier and submitted to the Treasury.

Having taken note of the current draft terms of the proposed contract between CCC and GoK, and being cognizant of the commercial terms defining that agreement, it is the purpose of this letter to require that a number of clauses in the said agreement be opened up to discussion for clarifications and necessary negotiations with the view to introducing necessary adjustments as would make the agreement fair and conscionable at law, at public policy and in the public interest. Below, we set out the most important of those issues.

At the discussions, a number of issues arose relating to the structure of the draft contract, which I set out below. These should inform the negotiating position of the GoK team at the discussions this morning.

1. The Letter of Commitment mentions Morpho Canada. At the negotiating table yesterday was a group of officials representing Morpho Safran, a corporation apparently registered in France. There is cause for reasonable concern whether the two companies are one and the same, and if not, what the relationship between Canada and France are with respect to the nationality of Morpho Safran. To erase doubts, we need to see the registration documents of the supplier, which will need confirmation of legitimacy and authenticity from CCC as to the supplier’s nationality. In the event the two turn out to be legally unrelated, and the latter be established to be a French, as opposed to a Canadian firm, the question of legal capacity to contract under the specific terms of the understanding between GoK and the Government of Canada arises, and it could be a sufficient bar to execution of this contract.

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2. It has also emerged that the said company has had integrity issues in the past in other jurisdictions, and was recently subjected to a fine in one of those jurisdictions. It will be recalled that the GoK requested the Canadian Government to conduct a due diligence on the supplier. The parameters of that due diligence process have not yet been released to the GoK, and neither have the findings been released. It would be imperative to request from the Canadians these assurances, in documentary form, to help the Kenyan side get better informed as to the commercial standing and other qualifications of the supplier under the laws of Kenya.
3. The question arose whether IEBC has capacity to sign onto the contract and bind the GoK into this substantial commercial loan. Valued at nearly Kes.6 Billion, the IEBC felt it prudent for Treasury to sign, and for the IEBC to merely countersign. The argument is that the system is in fact being procured by GoK, with IEBC being its operative agency. These are matters administrative and internal to GoK and should not feature at the negotiating table with CCC. Appropriate institutional positions will be taken internally.
4. Under the Public Finance Management Act 2012, section 49 requires that any new loans taken up by Government are set out in writing and be in accordance with the fiscal responsibility principles and the debt management strategy of the government. These require compliance with Art.201 of the Constitution and S.15 of the Public Finance Management Act 2012. This Treasury approval, properly documented, is necessary prior to this Office clearing the draft agreement for execution.
5. As far as ring-fencing the procurement strategy applied to this contract, the provisions of s.29, s.74, s.62 and s.6 of the Public Procurement and Disposals Act are relevant to note. Section 29 obligates procuring entities to promote competition, but recognizes

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instances where competition may be dispensed with. Where restricted tendering is adopted, the procuring entity must obtain written permission from its tender committee, and record in writing the reason for such restricted tendering. Under s.74, direct sourcing must not be used to avoid competition, and may be used only when there is only one person able to supply the desired goods (which does not apply to this case) or there is no reasonable alternative to the process (can apply to this case). Section 62 limits the thresholds on direct sourcing, and requires the recording of reasons, as well as the lodgment of the fact of direct sourcing by notification to the PPOA, where the contract sum exceeds Kes.500,000. Section 6(1) addresses instances where project financing is from external financing such as negotiated loans. Taking the totality of the foregoing into account, it is uncertain whether the funding of the BVRS procurement qualifies as 'negotiated loan'. Our view is that this is not necessarily a negotiated loan: the supplier was asked to quote, based on the technical specifications by IEBC, and all the GoK is doing presently is discussing overall project delivery dynamics, rather than the financing aspects – and this is regardless of any export credit guarantees the Canadian Government may extend to the supplier. It would appear that the Government (through Treasury) has already committed itself to the financing arrangement, but on commercial terms, hence the issues raised above require legitimation by Treasury executing necessary papers justifying the direct sourcing method adopted for this project, and lodging the same with PPOA as required under law.

6. The duty of the supplier under contract should cover the sourcing/fabrication, the removal of the kits from overseas to Kenya, and clearance at the port of entry, and until delivery to warehouses designated by IEBC. This is not the case in the current draft.

7. Clause 2: Effective Date – all the provisions currently purporting to define the 'effective date' are technically implementation and

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operational matters, which can legitimately be subjected to specific performance periods. For instance, the date when down payments are made cannot be the effective date. The 'Bank' is not defined – so the phrase is inconclusive. Clause 2.1(v): this is not acceptable: first, from a point of regard for Kenyan law – and the requirement for documentation of all imports into Kenya is universal, whether the imports are privileged or not; second, it is not a closing condition. This is an effective performance aspect. This entire clause needs re-casting. The Effective Date should also take into account the date of the Letter of Commitment, because that LoC creates fiscal liabilities on the part of GoK. The effective date should make reference to particular actions that bring the agreement to effect, and in this respect:

- a. The Ministry of Finance's certifying that public debt management principles have been observed;
  - b. The Ministry of Finance's complying with the Public Procurement and Disposals Act requirements on direct sourcing;
  - c. The legal opinion of the Attorney General paving way for signature;
  - d. The actual date of execution.
8. The statement 'CCC shall notify the customer when the effective date has been met' should be deleted, as that would be a patent fact on the face of the record.
9. The entire clause 4 is unacceptably worded. The tranches are not clearly attached to measurable deliverables. The tranches furthermore need to be broken down into lower thresholds. The current sequence of payments is greatly unconscionable and hugely disadvantages Kenya. Furthermore, any payouts should be subjected to IEBC compliance and performance certifications.

10. Clause 4.2: the penalties on unpaid invoices should be negotiated out. This is already a pricey contract.
11. Clause 4.4: the word 'services' is not defined – and must be defined to include after-sale services at no cost to GoK for at least 12 months post installation, not delivery.
- 12.4.5: CCC should not be permitted price variations – the wording almost operate as a punitive clause. We had problems under the Anglo-leasing contracts for such clauses.
13. Clause 5.1: the terms are inconsistent with the warranty obligations on the part of CCC, and negates the principle of after-sales service, and especially read together with clause 8.4 and clause 14. Ideal solution: delete 5.1. Especially taking into account the breadth of the implied fiscal obligations on GoK (purported to be extended to even 'non-official' entities).
14. Clause 5.2 needs careful review: to what precisely is CCC committing to? It must be obligated to undertake all contracted services/works, regardless of whether such leads to a construction of permanent establishment. This cannot be a discretionary power on the part of the supplier.
15. Appendices generally: all appendices are missing, so we cannot comment on their content or acceptability/validity at this point.
16. Clause 9.3: Two issues here: the obligation should be mutual: there must be cases where CCC has information which GoK may require to access. Secondly, unless technically impossible to list, it should be good practice to anticipate the categories of information that might be required under this clause. Thirdly, inability to supply information

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under this clause cannot be treated a non-performance event, giving rise to remedies for breach.

17. Clause 9.6 is patronizingly worded. Under what circumstances does the private property of the CCC become the subject of this contract? In any event, good faith and mutual respect demands the contracting parties accord each other reasonable facilitation for the benefit of the contract. At any rate, it must be remembered that the contract is not over CCC's private property. There might be need to delete this clause or drastically word it differently, and at the same time, if retained, the phrase 'CCC property' must be defined with a great degree of certainty.
18. Clause 9.7 and 10.2: is it not possible to name the specific locations in an appendix?
19. Clause 14.4.5: What is the rationale for no charges for the services rendered by CCC under the contract? These are standard issues over which suppliers meet their own costs. Taking into account the commercial nature of the financing underwriting this transaction, it does not make sense for GoK to take on costs over which it has no control, yet the suppliers are commercially compensated for the services rendered. Service users should bear their own costs.
20. Clause 14.4.7: the same comments in paragraph 20 applies.
21. Clauses 14.5 and 15 frees CCC from virtually all liability – and negates the warranty principles under contract. The current language should not be permitted to stand. Paragraph 2 of clause 15 furthermore limits CCC's liability to 10% of the contract: WHY? This is not fair on the Kenyan tax payer, and liability thresholds should be unlimited, and fettered only by arbitral awards under contract.

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22. Clause 16: transfer of risk cannot pass upon delivery of equipment at port of entry, and cannot fairly pass before the acceptance testing is completed successfully. Neither should it merely be fixated on payment of contract price in toto. Furthermore, the transfer of title and risk must tie in with the payment dynamics under clause 4.
23. 17.1: termination events should start from:
- a. Failure by CCC to secure necessary funding to achieve financial closure under contract;
  - b. Failure or unsanctioned delay in the delivery of the system to Kenya;
  - c. Inability by CCC to carry out necessary installations in line with overall project delivery timelines stipulated under contract or by IEBC;
  - d. Failure to remedy system glitches
  - e. In addition, there must be a reciprocal power and right on the part of GoK to slap penalties for non-performance or delays on CCC.
24. Clause 17.2: The proposed remedy by CCC is effectively distraint in lieu of rent. It is not a fair manner of dealing, and should be treated as a simple default, open to more civil remedies under contract. In any event, the equipment will have entered Kenya duty free, technically reducing the autonomy of CCC over the same. The clause needs to be recast accordingly.
25. General note: Tax exemption is not a right/entitlement: it is usually granted if the process is for the benefit of the public, and any discussions on tax exemptions must be conducted within that general understanding.

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26. Clause 18(1)(i) – the 60 day period is not in sync with the provisions we challenge in paragraph 4.2, and the provisions of clause 17. Consistency of principle, and reciprocity in treatment and contractual standing is necessary.
27. Clause 18(1)(iii): CCC's consent will not be relevant where there has been breach. This can be cured by the introduction of a proviso in appropriate terms.
28. Clause 18(1)(iv): all appendices are empty. But necessary software modifications designed to better serve Kenya's current and future needs must be permitted.
29. Clause 18.2: the contract doctrine of *quantum meruit* must be upheld, and so also the principle of preventing unjust enrichment. This project is being financed by tax payers funds, and this is one of those unconscionable terms on that basis. The whole of clause 18.2 needs to be recast: transfer of risk and title for completed works is complete, and CCC cannot purport to direct GoK on how to deal with its own property. Once completed, the completed portion of the contract passes title to GoK.
30. Clause 19.8: the provision is vague. The objective should be to differentiate between breaches of conditions and breaches of warranties, with justification being given for the specific aspects of those breaches for which money damages may not be adequate. However, this being a simple contract for the supply of an integrated physical and software system, and against which a specific contract sum will be entered into, it is difficult to sustain an argument in terms of clause 19.8, and it is our considered view that money damages shall be adequate in all cases of breach.

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31. Clause 20.2: The 'entire agreement' clause must be understood to include a supersession of the Letter of Commitment by the fact of execution of this agreement.
32. Clause 20.8.1 – must be renegotiated. The preferred choice of law should be Kenyan law, because in essence, this is a contract for the supply of goods and services to the Government and people of Kenya. The supplier is not a sovereign entity. Short of the equipment coming from overseas, the contract's proper place of performance is Kenya. The usage of the supplied systems takes place in Kenya. Any systemic failures harm Kenyans. And can occur only in Kenya. The core argument here is that this contract effectively has no link with any other jurisdiction under the Planet. It would be sad to construe the applicable law otherwise. As to the *situs* of the arbitration, it should be taken into account that the project takes place under exigent circumstances. Furthermore, the manner of procurement of these services should serve only to strengthen the reasons why Kenya should insist on hosting all disputes under this agreement.
33. Clause 20.9: This cut and paste clause has no place in the draft contract – and should merely serve to alert the GoK negotiating team that the draft terms of the current draft contract may not necessarily have been thought through and in our favour.
34. Clause 20.10 – It cannot be allowed to stand as presently drafted in light of the substantive challenges raised with respect to virtually every clause cited thereunder. And in any event, any of the ring-fenced provisions must be construed *mutatis mutandis* the limitations automatically arising from such obligations as the passage of title and risk, and similar events that substantively alter the contractual relations of the parties.
35. General comments:

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- a. Clause 13: what exactly is being protected? What about indemnification of GoK from acts of CCC and its employees?
- b. Technical specifications for this project required price quotations to include duties and taxes. CCC claims its quote excludes taxes. It is imperative for Treasury and IEBC to establish for a fact that this is the case, and that duties and taxes have not been hidden in the overall price. Such would give rise to unjust enrichment – and may require the seeking of explanation from CCC why clause 4.3 says what it does when it was specifically required to include these elements in its bid price.
- c. Clause 6: contract terms must be reasonable, and designed to engender goodwill. Paragraph 2 is unwarranted and unreasonable. Under paragraph 3, it should be the business of the supplier to source its own clearing agents and pay any dues accruing thereby, and not a GoK responsibility. The whole of paragraph 6, and similarly worded provisions in the contract, should be redrafted accordingly.

**Conclusion:**

In light of the substantive nature of the issues pointed out above, it is our advice that those matters be addressed effectively in the negotiations and in the redrafting of the agreement. Once all issues are agreed, and reduced into the agreement kindly send to us a cleaned up document for review and approval, as necessary.

Yours

GITHU MUIGAI,  
ATTORNEY GENERAL

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ANNEX 8

**THE STATE LAW OFFICE**  
**OFFICE OF THE ATTORNEY-GENERAL**

IEBC/BVRC/VOL 1

24<sup>th</sup> September 2012

Your Ref: \_\_\_\_\_

Date: \_\_\_\_\_

AG/CONF/21/54/1 VOL I (28)

Our Ref: \_\_\_\_\_

Mr. Ahmed Issack Hassan  
Chairman  
Independent Electoral & Boundaries Commission  
NAIROBI

Mr. Joseph K. Kinyua, CBS  
Permanent Secretary/Treasury  
Ministry of Finance  
NAIROBI

**RE: CONTRACT FOR PURCHASE OF HARDWARE AND LICENCE OF SOFTWARE FOR  
A BIOMETRIC VOTER REGISTRATION SOLUTION**

Your letter under Ref. No. IEBC/BVRC/VOL 1 dated 21<sup>st</sup> September, 2012 refers.

The Attorney-General has instructed me to write to you as hereunder.

Further to our letter Ref No. AG/CONF/21/54/1 VOL I dated 18<sup>th</sup> September, 2012, we note that most of the issues we had raised have already been adequately addressed in subsequent negotiation meetings and incorporated in the attached revised agreement. We note however that issues raised in paragraphs 1, 2, 4 & 5 have not been sufficiently addressed.

Subject to Ministry of Finance assuming responsibility with regard to the above issues, we find the agreement in order from a legal point of view and you may proceed with execution of the same.

DORCAS ACHAPA, MBS  
DEPUTY SOLICITOR-GENERAL  
FOR: ATTORNEY-GENERAL

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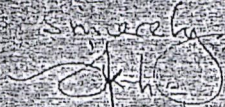
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Your cooperation on this matter will ensure free, fair and transparent general elections.

Yours

*Sincerely,*  


Joseph K. Kinyua, GBS  
PERMANENT SECRETARY/TREASURY

Copy to: Mr. Gichira Kibara, EBS  
Ad. Permanent Secretary  
Ministry of Justice, National Cohesion and  
Constitutional Affairs  
NAIROBI